Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN INC., a California Corporation dba Beverly Hills Motorworks; AFFORDABLE CARS INC., a California Corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,

and

FOX & FIELDS, a general partnership; ROBERT J. FOX; JERRY FIELDS; LAWRENCE R. ANSLEY, SR.; MARGARET ANSLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Should the Ninth Circuit Court of Appeals be allowed to ignore the "case-or-controversy" requirements of Article III of the United States Constitution, by refusing to follow the decisions of this Court and by relying on evidence not in the record.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PARTIES TO THE PROCEEDING viii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL, STATUTORY ORDINANCE PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

Procedural History 2

Statement of the Facts 3

REASONS FOR GRANTING THE WRIT 5

I. THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED ARCO'S ARTICLE III STANDING IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 6

A. *A Federal Citizen Suit under RCRA Must Establish Article III Standing to Confer Jurisdiction on the District Court* 7

B. *Standing Under Article III of The U.S. Constitution Requires That Three Elements Be Established: "Injury in Fact," "Causation" And "Redressability"* 8

C. The Court of Appeals Has Failed to Apply the Three Requirements of Standing under Article III of the U.S. Constitution 9

II. THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED ARCO'S ARTICLE III STANDING IN RELIANCE ON EVIDENCE NOT IN THE RECORD IN THE DISTRICT COURT, IN A CLEAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS 12

III. ARCO HAS FILED THIS LAWSUIT TO TAKE ADVANTAGE OF THE FEE PROVISION OF RCRA 13

IV. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER ALL OTHER CLAIMS IN THIS CASE DUE TO THE JURISDICTIONAL FAILURE OF ARCO'S CLAIM UNDER RCRA 15

V. THE FACT THAT THE COURT OF APPEALS' MEMORANDUM IS UNPUBLISHED SHOULD NOT BE A REASON FOR THE COURT OF APPEALS TO REFUSE TO FOLLOW THE DECISIONS OF THIS COURT AND RELY ON EVIDENCE NOT IN THE RECORD 16

CONCLUSION 17

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT OPINION 5a

ORDER DENYING PETITION FOR REHEARING 54a

DISTRICT COURT JUDGMENT 56a

ARTICLE III, SECTION 2 OF THE U.S. CONSTITUTION 62a

THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976 ("RCRA"), 42 USC § 6972..... 62a

TABLE OF AUTHORITIES

CASES

ACORN V. CITY OF PHOENIX, 798 F.2D 1260, 1263 (9TH CIR. 1986) 13

BENDER V. WILLIAMSPORT AREA SCHOOL DIST., SUPRA, 475 U.S. AT 541, 106 S.C. AT 1331 16

C.I.R. V. MCCOY, 484 U.S. 3, 7, 108 S.CT. 217, 219, 98 L.ED.2D 2 (1987) 16

CHRISTIANSBURG GARMENT CO. V EEOC , 434 U.S. 412, 420, 98 S.CT. 694, 699, 54 L.ED.2D 648 (1978) 14

COLE V OROVILLE UNION HIGH SCH. DIST., 228 F.3D 1092 (9TH CIR. 2000) 10

FISHER V. TUCSON SCHOOL DIST. NO. ONE, 625 F.2D 834, 837, 838 (9TH CIR. 1980) 16

G.J. LEASING V. UNION ELECTRIC, 839 F.SUPP. 21 (S.D. ILL. 1993) 7

GLADSTONE REALTORS V. VILLAGE OF BELLWOOD, 441 U.S. 91, 100, 99 S.C. 1601, 1608 (1979) 7

HARTMAN V SUMMERS, 120 F. 3D 157 (9TH CIR. 1997) 6

HULLMAN V. BOARD OF TRUSTEES OF PRATT COMMUNITY COLLEGE, 950 F.2D 665, 667-68 (10TH CIR. 1991) 13

LSO, LTD. V STROH, 205 F. 3D 1146, 1153 (9TH CIR. 2000) 9

LUJAN V DEFENDERS OF WILDLIFE, 504 U.S. 555, 560, 112 S.C. 2130, 2136 (1992) 6, 7, 8, 10

MIDDLESEX CO. SEWERAGE AUTHORITY V. NATIONAL SEA CLAMMERS ASS'N, 453 U.S. 1, 16-17, 101 S.C. 2615, 2624-2625 (1981).....7

NEWMAN V PIGGIE PARK ENTERPRISES, 390 U.S. 400, 402, 88 S.CT. 964, 966, 19 L.ED.2D 1263.....14

NORTHEASTERN FLA. CHAPTER, ASSOCIATED GEN. CONTRACTORS OF AMERICA V. JACKSONVILLE, 508 U.S. 656, 663-664, 113 S.C. 2297, 2301-2302, 124 L.ED.2D 586 (1993).....6

RAZORE V TULALIP TRIBES OF WASHINGTON, 66 F.3D 236, 240 (9TH CIR. 1995).....14

SIERRA CLUB V CHEMICAL HANDLING CORP., 778 F. SUPP. 24 (D.COLO. 1991).....7

SOUTHERN CALIFORNIA RETAIL CLERKS UNION & FOOD EMPLOYERS JOINT PENSION TRUST FUND V. BJORKLUND, 728 F.2D 1262, 1264 (9TH CIR. 1984).....13

STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT, 523 U.S. 83, 118 S.C. 1003(1998).....8, 9

TOSTE FARM CORP. V. HADBURY, INC., 70 F.3D 640, 646 (1ST CIR. 1995).....15

UNITED STATES V HAYS, 515 U.S. 737, 742, 115 S. CT. 2431, 2435 (1995).....6, 16

VALLEY FORGE CHRISTIAN COLLEGE V AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE, INC., 454 U. S. 464, 475-476, 102 S. CT. 752, 760-761 (1982).....7, 11

VERMONT AGENCY OF NATURAL RESOURCES V UNITED STATES EX REL STEVENS, 529 U.S. 765, 120 S. CT. 1858, 146 L. ED. 2D 836 (2000).....8

WHITMORE V ARKANSAS, 495 U.S. 149, 110 S.CT. 1717, 1724-1725 (1990).....10

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 6

28 U.S.C.A. § 1367 15

42 U.S.C. § 6972 ..... 1, 6

42 U.S.C. Section 6972(a)(1)(B) 2

RULES

Fed.R.Civ.P. 16(e) 13

PARTIES TO THE PROCEEDING

Including the parties named in the caption of the Petition, the parties are:

Petitioners: Jamshid Zaman, an individual; Mahvash Zaman, an individual; Behrouz Zaman, an individual; Zaman, Inc. (a California Corporation) dba Beverly Hills Motorworks; and Affordable Cars, Inc. (a California Corporation).

Petitioners, Zaman, Inc. and Affordable Cars, Inc., both California corporations, state, pursuant to Rules of the United States Supreme Court, Rule 29.6, that they have no parent companies, that they have not issued shares to the public, and that they have no parent company, subsidiary or affiliate which has issued shares to the public.

Respondents: Atlantic Richfield Company, a Delaware Corporation; Fox & Fields, a General Partnership; Robert J. Fox; an individual; Jerry Fields, an individual; Lawrence R. Ansley, Sr., an individual; and Margaret Ansley, an individual.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit entered on January 16, 2002, is set forth in the Appendix 1a-4a, and is unreported. The opinion of the United States District Court for the Central District of California entered on May 4, 200, is set forth in the Appendix 5a-53a and is unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court's Judgment was entered on May 23, 2000. The United States Court of Appeals for the Ninth Circuit issued its Decision on January 16, 2002. Petitioner timely filed a Petition for Panel Rehearing and Rehearing En Banc on January 30, 2002. The Court of Appeals issued its Order denying the Petition for Rehearing on March 12, 2002 (Appendix, pages 54a-55a). This Petition was timely filed.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Issue:

Article III, Section 2 of the United States Constitution (Appendix, page 62a)

Statutory Issue:

The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 USC § 6972 (Appendix, pages 62a-64a)

STATEMENT OF THE CASE

Procedural History

On or about July 10, 1995, Respondent Atlantic Richfield Company ("ARCO") filed an action against Petitioners Jamshid Zaman, Behrouz Zaman, Zaman, Inc. and Affordable Cars, Inc. (collectively referred to as the "Zaman Parties") seeking injunctive relief pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. Section 6972(a)(1)(B), and additionally seeking damages under state law causes of action for breach of contract, account stated and money paid.

The Zaman Parties filed a counterclaim against ARCO; Robert Fox, Jerry Fields, Fox and Fields, a general partnership (collectively referred to as "Fox and Fields"); and Lawrence and Margaret Ansley (the "Ansleys") for damages under California state common law causes of action for continuing nuisance, continuing trespass, declaratory relief, and for indemnity against Fox and Fields.

On January 31, 2000, the trial court entered the First Amended Pre-Trial Conference Order, as required by Local Rule 9.8. The trial of this matter was conducted before Honorable Audrey B. Collins and commenced on March 7, 2000 and ended on April 19, 2000.

On May 4, 2000, the court entered its Findings of Fact and Conclusions of Law (Appendix, pages 5a-53a). On May 23, 2000, the court entered its Final Judgment and Permanent Injunction (Appendix, pages 56a-61a). On June 7, 2000, the Zaman Parties filed a Motion to Vacate the Judgment on the ground, among others, that ARCO had no standing to sue and the District Court had no subject matter jurisdiction over ARCO's claim under RCRA since ARCO did not introduce any evidence that ARCO had suffered or would suffer at least some injury that may be redressed by judicial action, as required by Article III of the U.S. Constitution requiring "case or controversy." On August 8, 2000, the court entered an Order Denying the motion to Vacate the Judgement.

On August 29, 2000, the Zaman Parties timely filed a Notice of Appeal from the judgment. On September 12, 2000, ARCO timely filed a Notice of Cross-Appeal from the trial court's order granting the Zaman Parties' motion for partial summary judgment dismissing ARCO's causes of action for breach of contract, account stated and money paid. The District Court's decision was affirmed on January 16, 2002 by the Ninth Circuit Court of Appeals stating that "ARCO has Article III standing because there was a real controversy here between the parties. The Zaman Parties, through their representative Ebrahimi, contended that ARCO was responsible for the contamination and demanded that the company help cover remediation costs. Therefore, ARCO has more than an abstract interest in remediating the Property." (Appendix, page 3a).

The Petitioners have filed a Petition for Certiorari to this Honorable Supreme Court on the ground that the Ninth Circuit Court of Appeals has decided an important federal question (ARCO's standing under Article III of the United States Constitution) in a way that conflicts with relevant decisions of this Court. Furthermore, the Ninth Circuit Court of Appeals has decided ARCO's Article III standing in reliance on evidence not in record, in a clear departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

Statement of the Facts

This action involves gasoline and waste oil contamination at a site located at 8800 Burton Way ("the Property"). ARCO owned the Property and operated a gasoline station and a mechanic shop at the Property since 1937. The Ansleys purchased the gasoline station dealership and operated it from 1961 to 1979. On June 1, 1979, the Ansleys bought the Property from ARCO in an as-is condition for $500,000.00 and 45 days later sold the Property to Petitioners Jamshid and Mahvash Zaman for $900,000.00.

Jamshid Zaman briefly operated the gasoline station at the site from 1979 to 1980. Commencing in November 1980 and continuing until mid-1983, Jamshid Zaman leased the

Property to Fox & Fields which continued to use the gasoline supplied to the site by ARCO for its car rental customers. Fox & Fields used the Property from the end of 1980 until the middle of 1983. Starting in 1983, Behrouz Zaman operated a mechanic shop at the premises called Beverly Hills Motorworks. Commencing in mid-1994, Affordable Cars, Inc. dba Black and White Rental ("Affordable Cars") operated and continues to operate a car rental business at the Property.

At the time of the filing of this lawsuit by ARCO on July 10, 1995, Petitioners Jamshid Zaman and Mahvash Zaman were the owners of the Property, NOT ARCO. Furthermore, at the time of this lawsuit, ARCO did not own any of the neighboring properties and none of the neighboring property owners had any relationship to ARCO.

Prior to this lawsuit, the Zaman Parties did not contend that ARCO was responsible for the contamination and did not demand that the company help cover remediation costs.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Supreme Court Rules provides in pertinent part as follows:

> "... A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court considers:
>
> (a) a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> ....
>
> (c) ... a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court."

At the time of the filing of this lawsuit, ARCO did not own the Property, did not own any of the neighboring properties and had no relationship with the neighboring property owners. The contaminated Property, which is the subject of this lawsuit, was owned by Jamshid and Mahvash Zaman. As such, ARCO had not suffered any injury and there was no Article III case or controversy between ARCO and the Zaman Parties. Nonetheless, as discussed below, the Ninth Circuit Court of Appeals has decided that ARCO had standing under Article III of the United States Constitution, in a clear conflict with relevant decisions of this Court. Furthermore, the Ninth Circuit Court of Appeals has decided ARCO's

Article III standing in reliance on evidence that is NOT in the record, in a clear departure from the accepted and usual course of judicial proceedings.

I
THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED ARCO'S ARTICLE III STANDING IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The sole basis that the District Court found for the court's subject matter jurisdiction was pursuant to 28 U.S.C. § 1331 (federal question) based on ARCO's claim for injunctive relief against the Zaman Parties for violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972 (Appendix, page 35a). Although RCRA is a citizen suit statute that provides that "any person" may commence a civil action on his own behalf under RCRA, the law is clear that such language does not and cannot abrogate the "case or controversy" requirements of Article III of the United States Constitution.

Article III, Section 2, of the United States Constitution confines federal courts to the decision of "Cases" or "Controversies." Standing to sue is an aspect of the case-or-controversy requirement. *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 663-664, 113 S.C. 2297, 2301-2302, 124 L.Ed.2d 586 (1993).

Standing is a critically important jurisdictional limitation. It is an essential and unchanging part of the case-or-controversy requirement of Article III and the issue of standing can never be waived. *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.C. 2130, 2136 (1992); *United States v Hays*, 515 U.S. 737, 742, 115 S. Ct. 2431, 2435 (1995); *Hartman v Summers*, 120 F. 3d 157 (9th Cir. 1997).)

Article III requirements are regarded as "rigorous", i.e., those who do not have such standing may NOT litigate in

federal court. *Valley Forge Christian College v Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 475-476, 102 S. Ct. 752, 760-761 (1982).

A. A Federal Citizen Suit under RCRA Must Establish Article III Standing to Confer Jurisdiction on the District Court

This Court has held:

> "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' (Citation). **In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself . . . that is likely to be redressed if the requested relief is granted**.' (Citation)." (Emphasis added). *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.C. 1601, 1608 (1979); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-576, 112 S.C. 2130, 2144 (1992); *Middlesex Co. Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17, 101 S.C. 2615, 2624-2625 (1981).

In *Sierra Club v Chemical Handling Corp.*, 778 F. Supp. 24 (D.Colo. 1991), the court analyzed the same identical RCRA statute and held that "[t]o demonstrate standing under federal citizen suit provisions, a plaintiff must prove that it has suffered or will suffer at least some injury that may be redressed by judicial action. (Citation)." *Id.* at 25; *see also G.J. Leasing v. Union Electric*, 839 F.Supp. 21 (S.D. Ill. 1993) (RCRA Plaintiff no longer had standing because there was simply no current or threatened harm present in the matter).

B. *Standing Under Article III of The U.S. Constitution Requires That Three Elements Be Established: "Injury in Fact," "Causation" And "Redressability"*

The constitutional minimum of standing contains three elements: that the injury be "in fact" and not merely conjectural or hypothetical; that there must be a connection between the injury and the conduct complained of; and that it must be "likely" and not merely speculative that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.C. 2130, 2136- 2137 (1992).

> "The party invoking federal jurisdiction bears the burden of establishing these elements. (Citation). Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. (Citation)." *Lujan v. Defenders of Wildlife, supra*, 504 U.S. at 560-561, 112 S.C. at 2136-2137; *see also Vermont Agency of Natural Resources v United States ex rel Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).

This Court in following *Lujan, supra*, in the case of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.C. 1003(1998) has held that:

> The "irreducible constitutional minimum of standing" contains three requirements. (Citation). **First and foremost, there must be alleged (*and ultimately proven*)** an "injury in fact"–a harm suffered

> by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" (Citation). Second, there must be causation–a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. (Citation). And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. (Citation). **This triad of injury in fact, causation, and redressability (footnote omitted) comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.** (Citation). (Emphasis added) *Steel Co., supra*, 523 U.S. at 102-104, 118 S.C., at 1016-1017; *see also LSO, Ltd. v Stroh*, 205 F. 3d 1146, 1153 (9th Cir. 2000).

C. *The Court of Appeals Has Failed to Apply the Three Requirements of Standing under Article III of the U.S. Constitution.*

The Court of Appeals has failed to apply the three requirements of standing under Article III of the U.S. Constitution. The Court of Appeals has held:

> "ARCO has Article III standing because there was a real controversy here between the parties. The Zaman Parties, through their representative Ebrahimi, contended that ARCO was responsible for the contamination and demanded that the company help cover remediation costs. Therefore, ARCO has more than an abstract interest in remediating the Property" (Appendix, page 3a).

Injury in fact

The first prong of the test is "injury-in-fact." A mere contention, alleged to have been made by the Zaman Parties, that ARCO was responsible for the contamination of the property is hardly a concrete and actual injury to ARCO. There is absolutely no authority that would support such a holding. The Court of Appeals' citation to *Cole v Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000) is not even applicable to the issues in this case. The "injury in fact" requirement must involve an "invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v Defenders of Wildlife*, 504 U.S. 555, 559-560, 112 S.Ct. 2130, 2136 (1992); *Whitmore v Arkansas*, 495 U.S. 149, 110 S.Ct. 1717, 1724-1725 (1990).

The alleged contention by the Zaman Parties that ARCO was responsible for the contamination is NOT an "invasion of a legally-protected interest," is not "concrete and particularized," and is not "actual or imminent." It is simply not an injury at all. A corporation cannot possibly be injured by a mere contention by an individual that the corporation is responsible for the contamination of his property. There is absolutely no authority in support of a notion that freedom from contentions of responsibility is a legally-protected interest.

Causation

The second prong is causation. There must be a causal connection between the injury and defendant's conduct or omissions. In the present case, defendant's conduct is that he allegedly claimed that ARCO was responsible for the contamination and ARCO's injury, as found by the Court of Appeals, is the conduct itself. There is no authority that holds that the conduct itself could be the injury.

Redressability

The third prong is redressability. There should also be a likelihood that the injury will be redressed by a favorable decision. Even assuming, arguendo, that Zaman's alleged contention that ARCO was responsible for the contamination creates an "injury in fact," said injury cannot possibly be redressed by a favorable decision in this case. In this case, ARCO obtained an injunction against the Zaman Parties to remediate the Property[1]. Said injunction cannot possibly redress ARCO's alleged injury of Zaman's alleged contention that ARCO was responsible for the contamination. An injunction against Mr. Zaman to remediate the Property could not stop Mr. Zaman from contending that ARCO was responsible for the contamination.

Had the Court of Appeals applied the three part test enunciated by this Court, it could not possibly have found that ARCO had Article III standing. The Court of Appeals' decision, if allowed to stand, will practically abolish the "case or controversy" requirements of Article III of the United States Constitution and all the precedents decided by this Court. According to the Court of Appeals' holding, any state tort claim by one party would give standing to the other party to file a lawsuit in the federal court. The Court of Appeals' decision would in effect allow ARCO or any other company in the future to remove all state law claims of nuisance and trespass against them for contamination of their property from the state court to the federal court. The Court of Appeals' decision seriously undermines the "rigorous" requirements of Article III. *See Valley Forge Christian College v Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 475-476, 102 S. Ct. 752, 760-761 (1982).

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[1] It must be noted that ARCO could not legally seek and did not seek monetary damages under RCRA. The only relief sought by ARCO and granted by the District Court was an injunctive relief to cleanup Mr. Zaman's own Property.

II

THE NINTH CIRCUIT COURT OF APPEALS HAS DECIDED ARCO'S ARTICLE III STANDING IN RELIANCE ON EVIDENCE NOT IN THE RECORD IN THE DISTRICT COURT, IN A CLEAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Court of Appeals has relied on a fact that is not in the record. The Court of Appeals has failed to cite to the record in support of a finding of fact that ARCO has Article III Standing. There is no evidence in the record that any of the Zaman Parties, either directly or through Mr. Ebrahimi, ever contended that ARCO was responsible for the contamination, or that they ever demanded that the company help cover remediation costs. Furthermore, there is no evidence in the record that Mr. Ebrahimi was the representative of the Zaman Parties, as found by the Court of Appeals. ARCO cannot and will not be able to produce any evidence that was admitted into the record in support of the facts found by the Court of Appeals in support of ARCO's Article III standing. ARCO had the burden to introduce evidence that it had standing and had failed to do so and the Court of Appeals has relied on facts Not in the record, in a clear departure from the accepted and usual course of judicial proceedings.

The injury-in-fact, found by the Court of Appeals, was not even alleged in the Complaint or in the Pre-trial Conference Order. Paragraph 31 of the First Amended Complaint filed by ARCO alleges that:

> "As a direct and proximate cause of the imminent and substantial endangerment...Atlantic Richfield has been injured in that, inter alia: (1) there is a possibility that some person or entity might seek to hold Atlantic Richfield liable as a result of the contamination at the Property;

> and (2) Atlantic Richfield's degree of liability, if any, may be affected by the Zaman Defendants' continued failure to conduct remediation of the Property in a timely fashion."

Moreover, in the first Amended Pre-trial Conference Order, which supersedes all prior pleadings and has the effect of amending the pleadings and governs the course of trial (*see Fed.R.Civ.P.* 16(e); Local Rule 9; *Hullman v. Board of Trustees of Pratt Community College*, 950 F.2d 665, 667-68 (10th Cir. 1991); *Acorn v. City of Phoenix*, 798 F.2d 1260, 1263 (9th Cir. 1986); *Southern California Retail Clerks Union & Food Employers Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984)), ARCO has stated that the only reason ARCO found it necessary to request relief from the District Court under RCRA is "to ensure that the Zaman Parties remediate the Property to alleviate the possibility that gasoline and waste oil contamination will continue to migrate off the Property to neighboring Properties."

As it can be seen, no Article III controversy, as found by the Court of Appeals, was ever alleged by ARCO in any of its pleadings and no such evidence was proven at trial.

III
ARCO HAS FILED THIS LAWSUIT TO TAKE ADVANTAGE OF THE FEE PROVISION OF RCRA

The Court of Appeals' decision in this case, not only abolishes the rigorous requirements of standing under Article III of the Constitution and practically allows any person to make a federal case out of ordinary state claims of nuisance and trespass, it allows a party to recover attorneys' fees where they could not normally recover in the state court. Under RCRA, a prevailing party is entitled to attorneys' fees.

However, there are two different standards for plaintiff and defendant in a RCRA cause of action. A prevailing plaintiff is entitled to attorneys' fees "unless special circumstances would render such an award unjust." *Newman v Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263. Whereas a prevailing defendant is entitled to attorneys' fees only if plaintiff's action was "frivolous, unreasonable, or without foundation." *Razore v Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995).

As it can be seen, if the Zaman Parties had prevailed, in order for the Zaman Parties to recover their attorneys' fees, they would have had to show that ARCO's action was frivolous, unreasonable, or without foundation, which is extremely difficult in light of the fact that these type of cases are always decided based on the conflicting testimony of experts. To the contrary, when ARCO prevailed, ARCO was entitled to recover its attorneys' fees unless special circumstances would render such an award unjust. Accordingly, it is much more advantageous to be a plaintiff in a RCRA cause of action than a defendant and that is exactly why ARCO had taken the initiative to file a lawsuit in federal court.

The Court of Appeals' decision, therefore, would allow potential defendants to take the initiative as soon as there is a claim of contamination against them and become a Plaintiff in the federal court with the chance of recovering their attorneys' fees and no risk of paying attorneys' fees if they lose. That is not what was intended by Article III of the Constitution and RCRA. This Court in *Christiansburg Garment Co. v EEOC* , 434 U.S. 412, 420, 98 S.Ct. 694, 699, 54 L.Ed.2d 648 (1978), in holding that there should be two standards applicable to the award of attorneys' fees in Civil Rights Act of 1964, §706(k), stated that "... the legislative debates indicates that the fee provision was included to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'"

The Ninth Circuit Court in *Razore*, *supra*, 66 F.3d at 240, has applied the same standard to the RCRA cause of action. In the present case, the District Court and the Court of Appeals have awarded ARCO its attorneys' fees. However,

ARCO would not have been entitled to attorneys' fees if the Zaman Parties had filed a complaint in the state court for the state tort causes of actions, or if the Zaman Parties had raced to the federal court to file a complaint and become a plaintiff in a RCRA cause of action against ARCO. Certainly, the legislatures did not envision ARCO taking advantage of the fee provision of RCRA in such a way.

IV
THE COURT LACKS SUBJECT MATTER JURISDICTION OVER ALL OTHER CLAIMS IN THIS CASE DUE TO THE JURISDICTIONAL FAILURE OF ARCO'S CLAIM UNDER RCRA

Without original jurisdiction over ARCO's claim under RCRA due to ARCO's lack of standing , the court can not exercise supplemental jurisdiction over the counter-claims and cross-claims of the Zaman Parties, the Ansleys, and Fox & Fields pursuant to 28 U.S.C.A. § 1367.

Supplemental jurisdiction depends upon a transactionally-related and jurisdictionally proper underlying claim. If that claim is dismissed for lack of jurisdiction rather than on the merits, the "jurisdictional peg" for the supplemental claim is eliminated, and it too must be dismissed unless there is an independent basis for jurisdiction. *Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 646 (1st Cir. 1995). "Only those counterclaims that have an independent basis for jurisdiction can survive a dismissal of the original claim for lack of jurisdiction (Citation)." *Id.* at 646.

"Supplemental jurisdiction, 28 U.S.C. § 1367, is, in effect, derivative of the original claim's jurisdiction and thus cannot survive the jurisdictional failure of the original claim." *Toste Farm Corp., supra*, fn. 11, 70 F.3d at 646.

In the present case, the counter-claims and cross-claims of the Zaman Parties, the Ansleys, and Fox & Fields are derivative of the ARCO's claim's jurisdiction and,

therefore, cannot survive the jurisdictional failure of ARCO's claim under RCRA.

V

THE FACT THAT THE COURT OF APPEALS' MEMORANDUM IS UNPUBLISHED SHOULD NOT BE A REASON FOR THE COURT OF APPEALS TO REFUSE TO FOLLOW THE DECISIONS OF THIS COURT AND RELY ON EVIDENCE NOT IN THE RECORD.

This Court in *C.I.R. v. McCoy*, 484 U.S. 3, 7, 108 S.Ct. 217, 219, 98 L.Ed.2d 2 (1987), has held:

> "We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." *C.I.R. v. McCoy, supra*, 484 U.S at 7, 108 S.Ct. at 219

Similarly, in the present case, the Court of Appeals exceeded its jurisdiction by refusing to follow the decisions of this Court and by relying on evidence Not in the record. Without subject matter jurisdiction in the District Court, the appellate court has jurisdiction on appeal ***only*** for the purpose of correcting the lower court's error in entertaining the suit; ***it cannot consider the merits of the appeal.*** *Bender v. Williamsport Area School Dist., supra*, 475 U.S. at 541, 106 S.C. at 1331; *see United States v. Hays, supra*, 515 U.S. at 747, 115 S.C. at 2437 (district court judgment vacated and case remanded with instructions to dismiss complaint because appellants lacked standing); *Fisher v. Tucson School Dist. No. One*, 625 F.2d 834, 837, 838 (9th Cir. 1980) (appeal

dismissed because appellants lacked district court standing).

The Court of Appeals' holding in this case has reduced the strict and vigorous "case or controversy" requirements of Article III, set by this Court, to the point where any claim of responsibility by one party creates an article III "case or controversy." Such a holding is in a clear conflict with all the decisions of this court regarding the requirements of Article III of the United States Constitution. The fact that the Court of Appeals' decision is not published and will not set a precedent should not be a factor for this Court's review of this case.

CONCLUSION

A none-existent injury, which cannot possibly be redressed by the requested relief, is not sufficient to confer standing on a party under Article III of the United States Constitution. Absent such standing, there is no case or controversy, and no federal court jurisdiction. Absent such jurisdiction, the entire underlying judgment is void. Accordingly, it is respectfully requested that the court GRANT this Petition for a Writ of Certiorari and reverse the Court of Appeals' order, entered on January 16, 2002, and issue an order vacating the District Court's Judgment for lack of subject matter jurisdiction and the dismissal of the entire action.

Respectfully submitted,

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FILED

JAN 16 2002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

(Any footnotes trail end of each document)

No. 00-56490, No. 00-56576

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Plaintiff-counter-defendant-cross-defendant - Appellee,

v.

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN INC., a California Corporation dba Beverly Hills Motorworks; AFFORDABLE CARS INC., a California Corporation,
Defendants-counter-claimants-Appellants,

and

FOX & FIELDS, a general partnership dba Atlas Leasing Group Inc.; ROBERT J. FOX; JERRY FIELDS; LAWRENCE R. ANSLEY, SR.; MARGARET ANSLEY,
Counter and cross-claim defendants - Appellees.

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Plaintiff-counter-defendant-cross-defendant - Appellant,

v.

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN INC.,

a California Corporation dba Beverly Hills Motorworks; AFFORDABLE CARS INC., a California Corporation, Defendants-counter-claimants - Appellees,

and

FOX & FIELDS, a general partnership dba Atlas Leasing Group Inc.; ROBERT J. FOX; JERRY FIELDS; LAWRENCE R. ANSLEY, SR.; MARGARET ANSLEY, Counter and cross-claim defendants.

November 5, 2001, Argued and Submitted, Pasadena, California

January 16, 2002, Filed

COUNSEL:

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JUDGES:
Before: BRIGHT,** KOZINSKI, and W. FLETCHER, Circuit Judges.

OPINION:

MEMORANDUM *

ARCO has Article III standing because there was a real controversy here between the parties. The Zaman Parties, through their representative Ebrahim, contended that ARCO was responsible for the contamination and demanded that the company help cover remediation costs. Therefore, ARCO has more than an abstract interest in remediating the Property. "There can be no doubt concerning [ARCO's] personal stake in the outcome of the controversy." *Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092 (9th Cir. 2000)* (quoting *Bigelow v. Virginia, 421 U.S. 809, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975))*.

Substantial evidence supports the district court's findings of fact on each issue raised by the Zaman Parties. The district court did not abuse its discretion in imposing evidentiary sanctions for spoliation of evidence. The Zaman Parties knew that certain physical evidence was relevant to issues at trial, failed to notify ARCO of its existence, and subsequently destroyed it without notifying ARCO.

The district court did not err in granting summary judgment in favor of Fox & Fields and related defendants because after four years of litigation the Zaman Parties had no evidence that Fox & Fields was responsible for the contamination. The Zaman Parties failed to demonstrate the existence of a triable issue of material fact. See *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* The district court's award of attorneys' fees to ARCO was not excessive and the district court did not abuse its discretion. See *Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998); Corder v. Gates, 104 F.3d 247, 249 (9th Cir. 1996).*

Finally, we affirm the grant of partial summary judgment on ARCO's state law claims, for the reasons stated by the district court.

AFFIRMED.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

FILED
CLERK, U.S. DISTRICT COURT
MAY - 3 2000
CENTRAL DISTRICT OF CALIFORNIA
BY D.L DEPUTY

MAY - 4 2000
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV95-0566 ABC (AJWx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Plaintiff,

v.

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN INC., a California Corporation dba Beverly Hills Motorworks; AFFORDABLE CARS INC., a California Corporation,
Defendants.

Filed May 3, 2000 Entered May 4, 2000

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. ISSUES TRIED

This matter was tried before the Honorable Audrey B. Collins from March 7, 2000 through April 19, 2000.[1] Plaintiff and counter defendant Atlantic Richfield Company ("ARCO") brought a claim for injunctive and declaratory relief under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq. against Jamshid Zaman, Mahvash Zaman, Behrouz Zaman, Zaman Inc., a California Corporation, d/b/a/ Beverly Hills Motorworks and Affordable Cars, Inc., d/b/a Black and White Rent-a-Car, a California Corporation, (collectively the "Zaman Parties").[2]

The Zaman Parties brought counterclaims for continuing trespass, continuing nuisance, and declaratory relief naming ARCO and Lawrence R. Ansley, Sr. ("Mr. Ansley") and Margaret Ansley (collectively, the "Ansleys"). who are married to each other. The Ansleys brought a claim for declaratory relief against ARCO and the Zaman Parties and an indemnity claim against ARCO only.

ARCO called twelve witnesses; Ralph Moran, Senior Environmental Engineer for ARCO; Timothy Potter, Sales Manager for ARCO; Matthew Palilla, lessee/operator of ARCO gasoline station at 8800 Burton Nay; Lawrence Ansley, lessee/operator and owner of ARCO gasoline station at 8800 Burton Way; David Simon, owner of CNS and Associates, Martin Lindemulder, retired Systems Analyst for ARCO; James McGetrick, Quality Assurance Manager for ARCO; Eli Ebrahimi, owner of Ersa Grae;[3] Luis Carlos Stahl, owner of Cal Waste Reductions; Behrouz Zaman, Operator of Beverly Hills Motorworks; Jamshid Zaman; current owner of 8800 Burton Way Property; James Evenson, Hydrogeologist for and Principal of The Source Group.[4] The Zaman Parties called five witnesses including: Lawrence Ansley; Jamshid Zaman; and Carlos Luis Stahl, all of whom were also witnesses for ARCO, and David Lesperance, previously employed as Chief Geologist for United Pacific Environmental and current owner of Signal Geoscience.

II. FINDINGS OF FACT

A. General Facts

1. This lawsuit involves gasoline and waste oil contamination at the real property located at 8800 Burton Way, Beverly Hills, at the southwest corner of Robertson and Burton Way (the "Property")

2. The Property is located adjacent to formerly operating oil wells on all sides of the property. (Testimony of Evenson; Ex. 601)

3. In 1945, Thomas L. Fletcher sold the Property to Richfield. At that time, the Property had one 120 gallon waste oil underground storage tank ("UST") two 1,000 gallon gasoline USTs, and one 550 gallon UST. (Testimony of Matthew Palilla; Ex. 578)

4. Between about 1948 and 1961, Richfield leased the Property to Matthew J. Palilla. Mr. Palilla operated a gasoline service station ("Matty's Service") on the Property during the time he leased the Property from Richfield. (Testimony of Palilla)

5. In 1948, when Mr. Palilla was operating Matty's Service on the Property, the old gasoline USTs were replaced by Richfield with two new 4,000 gallon gasoline USTs. The old gasoline UST's were inspected upon removal by the fire chief of Beverly Hills and no problems were found with these tanks. (Testimony of Palilla)

6. During the time when Mr. Palilla operated Matty's Service on the Property, Richfield supplied gasoline to Mr. Palilla. Mr. Palilla performed inventory reconciliation on a daily basis and never learned of any leak in the gasoline system or the waste oil underground storage tank. (Testimony of Palilla).[5]

7. The Court found Matthew Palilla to be a credible witness. The court notes that Mr. Palilla had every motive to report any leak to ARCO. ARCO was responsible for maintenance of the tanks, at no cost to Mr. Palilla. In addition, Mr. Palilla had a strong financial incentive to report any loss of inventory to ARCO. ARCO set the retail gas price for their distributors and Mr. Palilla's profit margin was only a few cents a gallon. Thus, any profit earned by Mr. Palilla through gasoline sales would quickly be eliminated by inventory loss.

8. Mr. Palilla emptied the 120-gallon waste oil tank approximately every two weeks to once a month. The waste oil was removed by a pump truck that siphoned the waste oil

from the tank. The pump truck would be called by Mr. Palilla if the waste oil tank was getting full. Mr. Palilla did not dump or deposit waste oil into anything other than the 120-gallon waste oil tank. (Testimony of Palilla).

9. Beginning in 1961 Richfield and its successor Atlantic Richfield leased the Property to Mr. Lawrence Ansley. Mr. Ansley operated a gasoline service station ("Larry's ARCO") at the Property from June 1961 through in or about July 1979. Richfield and its successor Atlantic Richfield supplied gasoline to Mr. Ansley during the time he operated Larry's ARCO on the Property. (Testimony of Ansley).

10. The Court found Lawrence Ansley to be a credible witness.

11. In 1963, a contractor hired by Richfield demolished the gasoline service station on the Property. All gasoline USTs, the waste oil UST, and the gasoline pumps and lines were removed from the Property. The contractor built a new gasoline service station at the Property in 1963, installing one 4,000-gallon UST, two 3,000-gallon USTs, and a 280-gallon waste oil tank, along with gasoline pumps and lines. (Testimony of Ansley).

12. The gasoline and waste oil USTs were installed in the southeastern portion of the Property. Two pump islands, one on the eastern part of the Property parallel to Robertson, and one on the northern part of the Property parallel to Burton Way were also installed on the Property at this time. (Testimony of Ansley).

13. In 1963, the contractor hired by Richfield also installed two underground hoists at the Property. These hoists were located in the service room and went down into the floor. The contractor had to dig into the floor of the service room to install these hoists. In 1971, another 3,000-gallon UST was installed by Atlantic Richfield in the southeastern portion of the Property to accommodate the introduction of unleaded gasoline onto the market.

(Testimony of Ansley).

14. During the time when Mr. Ansley operated Larry's ARCO on the Property, he regularly performed gasoline inventory reconciliation and never learned of any leak in the gasoline system.[6] (Testimony of Ansley).

15. Mr. Ansley disposed of waste oil generated from oil changes by first disposing of the oil into a portable tank, which was then emptied into the 280-gallon waste oil tank through a fill-pipe in the garage. Mr. Ansley regularly checked the waste oil UST. He never discovered any leaks in the waste oil tank. When the waste oil tank was within about 75 gallons of being filled, Mr. Ansley called Superior Waste Oil to remove the waste oil. (Testimony of Ansley).

16. On June 1, 1979, Atlantic Richfield sold the Property - - including the USTs and the gasoline pumps and lines - - to the Ansleys. (Testimony of Ansley).

17. On August 27, 1979, the Ansleys sold the Property - - including the USTs and the gasoline pumps and lines - - to Jamshid Zaman and his wife Mahvash Zaman. (Testimony of Ansley; Ex. 77).

18. Beginning in September 1979, but no later than September 20, 1979,[7] Jamshid Zaman operated a gasoline service station at the Property. Jamshid Zaman was not in charge of the daily operation of the gasoline station and did not visit the Property on a daily basis. Houshang Aghdossi, the brother-in-law of Jamshid Zaman was in charge of the daily operation of the gasoline station as well as Behrouz Zaman, the brother of Jamshid Zaman. (March 22, 2000 Testimony of Jamshid Zaman) Gasoline was delivered by ARCO to the Property in September of 1979. (Testimony of Lindemulder; Ex. 503). The delivery consisted of ARCO regular (2,465 gallons), ARCO unleaded (3,933 gallons), and ARCO supreme (2,263 gallons). (Ex. 503) . ARCO regular and ARCO supreme are gasoline products containing lead, ARCO

unleaded is a gasoline product that does not contain lead. (Testimony of McGetrick).

19. When Jamshid Zaman purchased the Property, in September 1979, he planned to develop it and build an office building. (Testimony of Jamshid Zaman). In anticipation of this development, Jamshid Zaman hired an engineering and geologic consulting company, LeRoy Crandall & Associates ("LeRoy Crandall") to perform a geotechnical survey of the Property. The purpose of the geologic survey was to determine foundational specifications for construction of a medical building. (See, Ex. 520, 13). The company drilled three borings on the Property and prepared a report regarding its findings (the "Crandall Report").[8] (Ex. 225). Boring 1 was located in the southern section of the property, Boring 2 was located in the northeastern section of the property, and Boring 3 was located in the northwestern section of the property. According to the Crandall Report, petroleum odor and "streaks" of oil were detected in Boring 1. A significant amount of gasoline was found in the groundwater in Borings 2 and 3. However, gasoline contamination was not reported in the soil in any of the borings in this report. (Ex. 518 (First Amended Complaint, ¶ 13, Ex. 518 (Answer), ¶ 13); Testimony of Evenson; Ex. 225). Jamshid Zaman did not notify either Ansley or ARCO of the findings of the report in 1979.

20. After Jamshid Zaman began operating a gasoline service station at the Property, an underground pipe that ran from the east to the northern dispenser island was taken out of service in October of 1979. (Testimony of Jamshid Zaman; Ex. 307).

21. Jamshid Zaman did not conduct inventory reconciliation during the period the gasoline USTs were used after August 27, 1979. The 280-gallon underground waste oil tank was used by Jamshid Zaman until June of 1987. None of the Zaman Parties took inventory of the waste oil UST to determine when it was full during the time of its use. (Testimony of Jamshid Zaman).

22. Beginning in or about November 1980 and continuing until mid-1983, Jamshid Zaman leased the Property to Atlas Auto Leasing, which continued to use the USTs at the Property. (Testimony of Jamshid Zaman; Ex. 201).

23. After Jamshid Zaman bought the Property, Atlantic Richfield continued to supply gasoline to the Property until approximately April 1983. (Testimony of Jamshid Zaman, Ex. 202; Ex. 204). ARCO's last delivery of gasoline to the property was in April of 1983 (Testimony of Lindemulder; Ex. 507). During this time, both leaded and unleaded gasoline were sold and delivered to Mr. Zaman. (Testimony of Lindemulder). ARCO never delivered gasoline containing MTBE to the Property. In fact, MTBE was not added to gasoline sold by ARCO in Southern California until 1989. (Testimony of McGetrick).[9]

24. Around 1986, Jamshid Zaman attempted to develop the Property with Ersa Grae. Jamshid Zaman entered into an agreement with Mr. Ebrahimi to sell/develop the Property with Ersa Grae. Architectural plans were drawn-up to build a three to four story office building with underground parking on the Property. (April 13, 2000 Testimony of Jamshid Zaman; Ebrahimi Deposition at 21-22). In 1986, Ersa Grae hired I.T. Corporation to perform environmental testing on the Property. It was at this time, in 1986, that Jamshid Zaman first notified ARCO that there was contamination on the Property. (April 13, 2000 Testimony of Jamshid Zaman).

25. From in or about 1983 until in or about December 1993, Behrouz Zaman operated an automobile repair shop, Beverly Hills Motorworks, at the Property. During the time Behrouz Zaman operated the automobile repair shop on the Property, he performed about four to five oil changes per day, five days a week. Each oil change resulted in about four to six quarts of waste oil. (Testimony of Behrouz Zaman).

26. The Court did not find Behrouz Zaman to be credible. His claim that he hand-carried oil to the waste oil tank, opened it, and hand poured the oil into the waste oil tank

with a funnel from 1983-87 was incredible in view of his testimony that he (a) did not know the size of the waste oil UST; (b) never tested the tank to see if it was full; and (c) could not remember the name of the company that came to remove the waste oil (although he testified he had the waste oil regularly removed by a company). Behrouz Zaman's credibility was also diminished by his attempted "Perry Mason" surprise presentation (during examination by his attorney) of a receipt which supposedly proved that a company removed 100 gallons of waste oil from the site. Unfortunately for his credibility, Plaintiff's attorneys easily demonstrated that this receipt was dated in 1988, over a year after Zaman stopped using the underground waste oil system in 1987. The receipt referred to removal of oil from the above ground waste oil tank. Behrouz Zaman was apparently unaware of the significance of the date or the difference between aboveground and underground waste oil storage or of the later date.

27. Behrouz Zaman continued to use the waste oil UST at the Property until late June 1987, when a soil sample and a test revealed problems with the waste oil UST system. (Testimony of Behrouz Zaman, Ex.'s 1, 2). Behrouz Zaman never knew the size of the waste oil UST. Furthermore, he never performed inventory on the tank (i.e., he did not "stick test" the tank), to determine if the waste oil tank was full, and therefore, never knew when the waste oil UST needed to be pumped out. Behrouz Zaman could not remember the name of the company that emptied the waste oil tank. The waste oil UST was not equipped with overfill protection. (Testimony of Simon) - If that UST was overfilled, waste oil would be released into the ground.

28. After Behrouz Zaman stopped using the waste oil UST in June of 1987, waste oil was stored in above-ground 55-gallon drums. These drums were stored on the site for more than a year. (Testimony of Behrouz Zaman). The 55-gallon drums were overfilled and left open on the property. Staining was observed around the perimeter of the barrels.[10] (Testimony of Potter).

29. Waste oil staining was also observed around the top of the western most gasoline UST. (Testimony of Potter). ARCO never received any records of waste oil recycling from Mr. Jamshid Zaman despite regular requests to him for this information. (Testimony of Potter).

30. Behrouz Zaman used the underground hoists at the Property for a time. He later stopped using the underground hoists and installed above-ground hoists. (Testimony of Behrouz Zaman).

31. The Court did not find Jamshid Zaman to be credible. He was frequently evasive. Rather than accepting the Defendant's version of Jamshid Zaman as an innocent, naive small gas station owner crushed by Plaintiff, the Court finds him to be a savvy, experienced businessman who sought and found opportunities for profit in this site. Jamshid Zaman has prolonged this long-running saga of contamination and delayed its remediation in order to seek damages from the site. The Court's assessment of Jamshid Zaman's credibility is supported by among other things, the following:

32. First, Jamshid Zaman is simply not a gullible small business owner. In addition to this site, he bought two other properties, a business property in Ventura and a residential property in Mt. Olympus within a year of his purchase of the Property. Although Jamshid Zaman denied he read the Crandall Report (Ex. 225) at the time he received it, the Court does not find this to be credible. The witness was impeached on too many issues to be credible. For example, Jamshid Zaman denied he was represented by a broker when he purchased the site, but was easily impeached by Ex. 2006, instructions which showed he was represented by B. Riznick. The Court finds that Jamshid Zaman only recalls documents and facts when it is convenient for him to do so.

33. In fact, when it is convenient, Jamshid Zaman retains no documents at. all. Although he has been on notice of possible contamination since 1979, (the date of the Crandall Report), or at the latest since 1986 (the year in which he

notified ARCO), Jamshid Zaman has not retained any records of gasoline or waste oil inventory, maintenance of gas or oil tanks, or removal of waste oil from 1979 to present. This places him in quite a different light than Mr. Ansley, who had no reason to know of the contamination until many years after he sold the Property.

34. Additionally, Jamshid Zaman has not been straight forward in his business dealings with ARCO or others. First, Jamshid Zaman violated the terms of his lease with ARCO. (Ex. 202). He did not tell ARCO that he had stopped operating the dealership as required by the lease. Instead, Jamshid Zaman leased the site to Atlas (Ex. 201) . When ARCO discovered this, it terminated his lease. (Ex. 204). Second, Jamshid Zaman admitted that he submitted a false loan application, putting his brother, Behrouz Zaman's name on a loan application for Jamshid Zaman's rental car business, Black-and-White Rent-a-Car. (April 13, 2000 Testimony of Jamshid Zaman) . Third, he refused to pay Mr. Ansley as required by the note on the Property. (See, foreclosure notices - Ex.'s 2014 and 2015; April 13, 2000 Testimony of Jamshid Zaman).

35. Further, Jamshid Zaman refused to pay United Pacific for services relating to the environmental assessment of the Property. (Ex. 466) Jamshid Zaman submitted a request under penalty of perjury to the Underground Storage Tank Fund for $58, 182.94 for reimbursement for United Pacific's services. (Ex. 444). After the Fund reimbursed Jamshid Zaman in connection with his submission in October of 1997, he then refused to pay United Pacific. In response, United Pacific wrote Jamshid Zaman a series of letters demanding payment. (Exs. 466 (November 1997 letter); 467 (December 1997 letter) . United Pacific was finally forced to sue Jamshid Zaman for nonpayment (Ex. 467; Testimony of Jamshid Zaman) - Jamshid Zaman eventually negotiated a discount on the money he owed United Pacific (Ex. 470) and ultimately paid United Pacific $10,300 less than the amount he was reimbursed from the state UST Fund. (Ex. 471). He never revealed his discounted payment to the UST Fund, thus

turning a profit from the environmental assessment.[11]

36. Finally, Jamshid Zaman's testimony with respect to the status of remediation on the Property is not credible. He testified that the Water Board stopped Phase 2 of the remediation to install 4 or 5 tanks for Phase 3. He then testified that Stahl and Lesperance were "handling it." Contrary to the testimony of Jamshid Zaman, Stahl testified that he received approval from the UST Fund in September or October of 1998 to complete Phase 2. Lesperance testified that he is not handling Phase 2 or 3 of the remediation also contradicting the testimony of Jamshid Zaman.

37. ARCO was first given notice of contamination on the Property was nearly eight years after Jamshid Zaman first knew or should have known of the potential contamination on the Property based on the Crandall Report. Prior to 1986, Atlantic Richfield never knew or was told of any leak in the gasoline system or the waste oil UST at the Property. By the time Jamshid Zaman notified ARCO of the gasoline contamination at the Property, ARCO had, pursuant to its standard policies, discarded a number of documents pertaining to the Property. The Court finds that in the absence of knowledge of contamination at the site, ARCO acted in good faith in its standard destruction of records.

38. In March 1990, there was an explosion or fire in a toilet at the Property. The toilet fire was caused by flammable substances or vapors coming from the toilet. (Testimony of Potter, Ex. 345) . The toilet is connected to the sewer lines on the property. The clarifier or "sump" located in the mechanic's shop on the property is also connected to the sewer lines on the Property. (Testimony of Potter; Ex. 346).

39. Since mid-1994, Affordable Cars, Inc. d/b/a Black-and-White Rent-a-Car, owned by Jamshid Zaman, has continuously operated a rental car agency at the Property. For at least part of this time, Black-and-White Rent-a-Car has had its rental cars serviced on the Property. (Testimony of Jamshid Zaman).

40. Beginning in or about 1994, Jamshid Zaman leased a portion of the Property to a mechanic's shop operated by Rozbeh Missaghi. Missaghi leased the Property from Jamshid Zaman on a month to month lease arid serviced the rental fleet of Mr. Zaman as part of the lease agreement. (April 13, 2000 Testimony of Jamshid Zaman).

41. For a number of years after 1987, ARCO engaged in extensive good-faith negotiations with Jamshid Zaman and his representatives concerning a potential agreement to remediate the Property. (Testimony of Potter). The Zaman Parties and ARCO entered into an agreement regarding the apportionment of remediation costs on the Property. (Ex. 518 ¶ 20; Ex. 519, ¶ 20 (Zaman Parties' Answer, admitting entering agreement but denying terms were as stated in First Amended Complaint); Ebrahimi Deposition at 77).[12]

42. In or about mid-1991, ARCO forwarded a draft Cost Allocation Agreement apportioning the costs of remediating the Property in connection with the construction of a commercial building on the Property. (Ebrahimi Deposition at 77; Ex. 518). Despite lengthy negotiations, Jamshid Zaman declined to sign the draft Agreement. Nevertheless, ARCO remained on the Property from 1987 to 1995 and completed the site assessment work.

43. The Court finds that ARCO, once notified, acted in a timely manner to assess and initially remediate the site, removing the contamination which it considered to be the most dangerous at the time. As a result of its initial remediation efforts, ARCO removed a significant amount of contamination (about 2,000 gallons) from the Property in the form of free phase petroleum product in the early 1990's.[13] (April 11, 2000 Testimony of Lesperance).

44. ARCO has spent $200,223.39 on site assessment and remediation at the Property, much of it in response to agency orders requiring Jamshid Zaman to prepare work plans and reports and to engage in groundwater monitoring. (Testimony of Moran; Ex. 549).

45. After the Zaman Parties failed to take appropriate steps to remediate the Property, ARCO on October 14, 1994 gave the 90 days' notice to the Zaman Parties and governmental officials required under 42 U.S.C. § 6972(b) (2) (A) prior to bringing suit under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq.

46. On January 30, 1995, ARCO filed this lawsuit. No remediation was done on the Property by the Zaman Parties until this lawsuit was filed by ARCO. After this lawsuit was filed, a site assessment report was prepared by United Pacific Environmental ("United Pacific") and submitted to the Water Board. The UST Fund reimbursed Jamshid Zaman $10,000 in excess of what he paid to United Pacific.[14]

47. In October of 1997, the USTs at the Property were excavated and removed by David Simon. The UST's were removed from the Property only after Jamshid Zaman was ordered to do so by the Water Board. (March 21, 2000 Testimony of Jamshid Zaman).

48. This excavation revealed a leak in the westernmost gasoline UST. (Testimony of Simon) . The leak originated from a number of large holes located in the ten o'clock position on the UST. (Testimony of Simon) . The ground underneath this UST was heavily stained with oil and gasoline and fumes emanated from the excavation site. This was more contamination than Mr. Simon had observed at any other site to that date. (Testimony of Simon).

49. Contamination was also observed around the waste oil tank when it was removed. The soil up to the top and around the waste oil UST was wet with oil. (Testimony of Simon).

50. On September 11, 1998, Cal Waste Reductions, Inc. ("Cal Waste") submitted a bid to remove contaminated soil at the Property. (Testimony of Stahl) - Jamshid Zaman accepted that bid. Cal Waste is performing the site remediation work in phases, completing excavation in the southern portion of the

Property ("Phase 1") before starting excavation in the northern portion of the Property ("Phase 2). The third phase of remediation ("Phase 3"), involves removal of groundwater contamination on the Property. Remediating the soil in phases allows Black-and-White Rent-a-Car to continue operations at the Property. (Testimony of Stahl).

51. Cal Waste has agreed with Jamshid Zaman that Cal Waste will accept. as full payment for the current remediation work any amounts that Jamshid Zaman receives from the UST Fund, even if the UST Fund does not pay all amounts billed by Cal Waste. (Testimony of Stahl).

52. In February 1999, the Zaman Parties began to remove contaminated soil at the Property. Phase 1, involving soil removal in the southern part of the Property, is now complete, unless the state requires additional excavation.

53. Phase 1 of the remediation was completed in conjunction with remodeling of the property. The cost of the remodel was in part defrayed by reimbursement from the UST Fund as costs associated with remediation.

54. The next phase of work, Phase 2, involving soil removal in the northern part of the Property, has not yet begun. A plan for Phase 2 has been submitted and approved by the Regional Water Quality Control Board (the "Water Board") (April 18, 2000 Testimony of Stahl) . The contractor awarded the bid to remediate this portion of the property (i.e., Mr. Stahl), is ready to begin work. (Testimony of Stahl). However, the Zaman Parties have failed to start such work, even though the Court on July 19, 1999 continued the pre-trial conference and the trial until 2000 in the expectation that the Zaman Parties would commence and complete soil removal in the northern part of the Property.[15] The Zaman Parties have failed to provide any credible explanation as to why they have not even begun Phase 2 of the remediation.[16]

55. After the excavation work is completed, there will need to be continued groundwater remediation at the

Property (i.e., Phase 3). (Testimony of Evenson) . A plan was submitted for the third phase of groundwater remediation to the Water Board in the summer or fall of 1999. (Testimony of Stahl) However, no further action has been taken to remediate the property since this time and the Zaman Parties have not asserted any intention to fully remediate the property regardless of the outcome of this litigation.[17]

56. The remaining gasoline and waste oil contamination on the Property constitutes a continuing threat to human health and the environment. The most recent information on the status of the contamination reveals that the unremediated contamination has moved off-site and will continue to do so unless action is taken. (Testimony of Evenson; Exs. 606 - 609).[18] If the Property is not remediated, the groundwater will continually be decontaminated with each seasonal cyclic rise and fall of the water table. (Testimony of Evenson). This groundwater could potentially contaminate existing sources of drinking water or be used as a future source of drinking water. (Testimony of Evenson). Further, vapors from the on-site contaminants are toxic to humans and may potentially permeate subsurface structures causing harm to the occupants. These vapors are flammable and could ignite in the manner observed in the 1991 toilet fire on the Property.

57. The Water Board has not issued an enforcement order regarding remediation of the Property and has not determined that the Property is a substantial danger to the environment. (Testimony of Ross). However, the Water Board does not generally engage in enforcement proceedings in "tank cases" and the Water Board does not apply the same standards of endangerment as RCRA. (Testimony of Ross). Further, when the Water Board declined to issue an order, it reasonably assumed that the Zaman Parties would proceed with the remediation of the property as planned. The Water Board could not have foreseen that the Zaman Parties would cease all cleanup efforts after the completion of Phase 1. Accordingly, the Court finds that the Water Board findings should be given relatively little weight in the determination of whether the site presents an imminent and substantial

endangerment of health or the environment at this time.

58. The Court finds Mr. Ross is a credible witness. The Zaman Parties called Mr. Ross as a non-paid expert witness. Ross's involvement with the Property stems from his employment as chief of site cleanup for the Los Angeles Regional Water Quality Control Board. During his employment with the Water Board, he was the project engineer responsible for the Property located at 8800 Burton Way. (Testimony of Ross). Mr. Ross unofficially left his position at the Water Board in December of 1998 (i.e., he was no longer on the payroll) and his employment at the Water Board officially ended on April 3, 1999. Mr. Ross never made a determination as to the amounts of contaminants released onto the property before or after October 1, 1979 when he was employed with the Water Board.

59. Although Mr. Ross is a former employee of the Water Board and apparently unbiased, his testimony as an expert witness in this litigation is of limited reliability based on: (1) the tact that he has not reviewed all of the underlying documents and information related to the contamination at the site (e.g., he was unaware of crude oil production wells near the property and had not been informed of the line leak on the property in 1979); (2) his employment with the Water Board ended about a year before this trial (thus, he did not have access to any current information or findings of the Water Board); and (3) much of the information he relied upon in forming his opinions was based on information relayed to him by the Zaman Parties and not the original factual data (which contradicts information relayed to him by the Zaman Parties).

B. Responsibility for Contamination.

60. The contamination on the Property may be divided into three principal areas. These are: (1) gasoline contamination in the northern part of the Property; (2) gasoline contamination in the southern part of the Property; (3) waste oil contamination in the southern part of the

Property.

61. Oil and gas contamination was first reported on the Property in September of 1979 in the Crandall Report.[19] (Testimony of Evenson; Ex. 225) . There was no shallow gasoline contamination in the soil reported anywhere on the property at this time and the oil contamination was limited to "streaks of oil ."

62. In 1987, an environmental assessment was performed on the Property by I.T. Corporation. I.T. Corporation was retained by Ersa Grae in June of 1987 to assess the Property for contamination. (March 22, 2000 Testimony of Jamshid Zaman; Ex. 23). This study revealed gasoline contamination in the northern section of the Property in the groundwater (consistent with the earlier findings of the Crandall Report) . This study also showed gasoline contamination in the soil in the northeast and southern sections of the property that was not present at the time of the Crandall Report. (Testimony of Evenson).

63. Subsequent environmental studies of the Property show a large gasoline plume in the northeast section of the Property and a large gasoline plume in the southern section of the Property. A large waste oil plume is also present in the southern section of the Property. (Exs. 607-609) . There is no evidence that the two shallow gasoline plumes and the waste oil plume were present on the Property before the Crandall Report in September of 1979.

64. ARCO and the Ansleys' expert witness regarding responsibility for contamination on the Property is James Evenson. The Zaman Parties called two expert witnesses regarding responsibility for contamination on the Property, David Lesperance and Jim Ross.[20] The expert testimony in this case was lengthy and often contradicting. Ultimately, the Court finds Plaintiff's Expert, Mr. Evenson, to be more credible than the Zaman Parties' primary expert witness, Mr. Lesperance.

65. Although Mr. Evenson was somewhat evasive on cross-examination, the Court finds he is generally a credible witness. Mr. Evenson's opinions were based on credible underlying facts and assumptions regarding those facts. Further, Mr. Evenson's theories regarding the source and timing of the Property's contamination fit the underlying factual data and his logical inferences were sound. Mr. Evenson declined throughout this litigation to overstate ARCO's position and was very clear in asserting what the facts did and did not show and what could and could not be concluded from those facts, thereby bolstering his credibility.

66. In contrast, Mr. Lesperance's expert report and original testimony were based on several factual assumptions that were not borne out by the evidence. First, Mr. Lesperance believed and assumed that organic lead had been eliminated from gasoline by 1979 and therefore there could not have been lead in the gas sold on-site after September of 1979. (See, Pl.'s Cross Examination of Lesperance on April 5, 2000; Lesperance Deposition at Vol. I, p. 50). Second, Lesperance believed/assumed that MTBE was introduced into ARCO gasoline by 1979. (Testimony of Lesperance on April 5, 2000 on Cross Examination).[21] On cross-examination by ARCO, Lesperance stated he could provide an EPA document confirming the elimination of lead by 1979. Lesperance cited to Ex. 1072, an MTBE fact sheet, but in fact, that document does not reference lead at all, let alone its removal date. The court also notes that in his deposition, Lesperance testified that his opinion regarding the source of contamination would change it his assumptions regarding the date lead was introduced onto the market changed. Lesperance further admitted that if leaded gasoline were sold from the northen pipe and it had no MTBE, his opinion about the source of contamination in the northeast quadrant would change. (See, Deposition at 61; Lesperance Cross Examination on April 5, 2000). Although Lesperance was able to testify to alternative theories explaining why Plaintiffs should be responsible for the contamination, the Court ultimately did not find these theories persuasive.

67. Second, the Court finds that Lesperance's failure to take a complete history of the site, an oversight which may have contributed to the incomplete assumptions above, undermined his conclusions. On cross-examination, Lesperance admitted that he: (1) never discussed with Jamshid Zaman whether he sold leaded gas at the site; (2) made no effort to determine whether there were any deliveries of leaded gas product after September 1, 1979; (3) did not conduct Nexus research or any other research into the dates on which lead was eliminated and MTBE was introduced in gasoline in California; (4) was not aware of the date Jamshid Zaman began operating the gasoline station; and 5) had not read any of the depositions in the case, even after he wrote his expert report and before his own deposition. It was therefore unknown to him, for example, that Mr. Ansley remained on the site for two weeks after the sale to Jamshid Zaman.

68. Third, and most damaging to Lesperance's credibility, was his abandonment of his role as expert and assumption of the role of the Zaman Parties' investigator. On March 30, 2000, Lesperance testified that he talked to the author of the Crandall Report (Ex. 225) and got a copy of his notes. Lesperance testified that the author revealed that although the Report cited only water and streaks of oil at Boring 1 at 17 feet, the author told him there was also free phase gasoline at this boring. Predictably, ARCO then sent its expert, Evenson, to talk to the authors. On April 4, 2000, Evenson testified that the Crandall Report author said he wasn't on site when the borings were done and that he had "absolutely no recollection of the details at this time." (Evenson Testimony, April 4, 2000) -Faced with this contradiction of his prior testimony, on April 5, 2000, Lesperance modified his testimony, now agreeing with Evenson that the author of the Crandall Report did not recall the site and had told him that the logs should stand as they read.

69. This exchange was devastating to Lesperance's credibility with the Court. When the Court ruled that each party's expert could sit through the opposing expert's

testimony, the Court never anticipated that an expert would utilize this as an opportunity to conduct outside investigation during trial. Lesperance's investigative work went far beyond refinement of a prior expert opinion (although the trial featured not just refinement but reformulation of Lesperance's expert opinions) - This was work that should have been performed, if at all, well before trial and by the usual means of discovery. Trial by ambush is disfavored in the federal system. In this case, the defense tactics backfired against the Zaman Parties. The result is that, having weighed both Evenson's and Lesperance's expert testimony, the Court finds Evenson to be by far the more credible expert.

1. Gasoline Contamination in the Northern Part of the Property.

70. There is gasoline contamination in the groundwater throughout the northern section of the property and gasoline contamination in the soil only in the northeast section of the Property.

a. Groundwater Contamination in the North.

71. ARCO asserts the groundwater gasoline contamination in the northern part of the Property is the result of migration from an off-site source. (Testimony of Evenson).

72. The Zaman Parties assign responsibility for the contamination in the groundwater in the northern section of the property to Plaintiff based on the presence of lead in the gasoline, which they argue predates the period of Jamshid Zaman's ownership of the Property. (Testimony of Lesperance).

73. The predominant flow of groundwater on the Property is from the north to the southeast. Any contaminant released on the Property would migrate to the southern section of the Property and eventually move off-site. Similarly, a nearby off-site release of contaminants to the

north would eventually migrate south onto the Property. (Testimony of Evenson; Lesperance).

74. The northwest section of the property is up-gradient to any potential on-site source of groundwater contamination such as underground piping or UST's. (Ex. 604). Groundwater contamination is also present off-site directly to the north and there are two gas-stations to the north, which are potential sources of contamination on the Property. (Testimony of Evenson).

75. According to the laws of physics i.e., water runs downhill), the only source of potential groundwater contamination in the northwest section of the Property is off-site. The Zaman Parties have not identified any possible way groundwater contamination could be present in the northwest section of the Property and have originated from an on-site down gradient source. Further, the Crandall Report (Ex. 225) shows the contamination in the northeast was limited to the groundwater until sometime after September of 1979. Thus, the court finds that the groundwater contamination in the northern section of the property is attributable to off-site migration Onto the Property.[22]

b. Soil Contamination in the Northeast.

76. The Zaman Parties assert Plaintiff is responsible for the shallow contamination in the north based upon Jamshid Zaman's testimony: (1) that he did not operate the station until after a time when the leaking line to the northern dispenser was capped in October of 1979 (Testimony of Jamshid Zaman) ;[23] and (2) their argument that the additive composition of the gasoline in the soil (primarily unleaded with no MTBE and a trace amount of lead) proves that the gasoline contamination occurred before September of 1979. (Testimony of Lesperance).[24]

77. ARCO attributes the shallow (soil) contamination in the northeastern section of the property to the Zaman Parties based on: 1) no shallow gasoline contamination observed on

the property in September of 1979 (Ex. 225, the Crandall Report); 2) shallow gasoline contamination observed on the Property in the 1980's (Testimony of Evenson); and 3) a line leak occurring on the Property in October of 1979, after the Crandall Report, during the time that Jamshid Zaman owned the property.[25] (Exs. 466, 304-306) . ARCO asserts that the northern leaded dispenser island was switched to an unleaded dispenser in October of 1979 and that a line leak occurred as a result of the work on the dispenser island. (Testimony of Evenson; Exs. 304-306) Plaintiff's switching theory also accounts for the small amount of lead in the contamination plume. (Testimony of Evenson).

78. Unleaded gasoline was first introduced onto the commercial gasoline market sometime in the early 1970's. (Testimony of Ansley). When Mr. Ansley sold the Property to Jamshid Zaman in August of 1979, only the eastern dispenser island dispensed unleaded gasoline. The northern dispenser island dispensed only leaded gasoline. (Testimony of Ansley).

79. The northeast gasoline plume is comprised primarily of unleaded gasoline with a trace amount of lead. (Testimony of Lesperance; Evenson) and originates from a point between the two dispenser islands on the property, coincident with an underground dispenser line. (Ex. 606).

80. The northeast section of the property was undeniably contaminated as of June of 1987. (Ex. 23, Letter from W.W. Irwin to Jamshid Zaman). The Court finds this shallow gasoline contamination in the northeast was not present in September of 1979 (based on Ex. 225, the Crandall Report).

81. Based on: (1) Mr. Ansley's credible testimony that he never dispensed unleaded gasoline from the northern pump island; 2) the absence of shallow gasoline contamination in September of 1979; and 3) the presence of shallow gasoline contamination in the mid 1980's, the Court finds that the Zaman Parties are responsible for the gasoline contamination in the northeastern portion of the property.

2. Gasoline Contamination in the Southern Portion of the Property.

82. In September of 1979, there was no gasoline contamination in the southern portion of the Property in either the groundwater or the soil. (Ex. 225; Crandall Report). In 1987, this same area was completely contaminated with gasoline and oil. (Testimony of Evenson).

83. In 1997, the westernmost gasoline UST was pulled and large "swiss cheese" type holes were observed along the seams of the tank in the ten o'clock position. (Testimony of Simon). Mr. Simon, the operator of the backhoe, testified that he was overcome by the petroleum fumes coming from the excavation.

84. The gasoline plume in the southern section of the property extends south from the former position of the westernmost gasoline UST. (Ex. 609). The contaminated gasoline contains lead and MTBE. (Testimony of Lesperance; Evenson) The portion of gasoline containing MTBE is necessarily attributable to the Zaman Parties as MTBE was not introduced onto the market until long after Mr. Ansley sold the Property to the Zaman Parties.[26] The presence of lead in the contamination plume does not sufficiently date the gasoline to a time before the Zaman Parties owned the property.

85. The Zaman Parties, faced with the damaging evidence of the leaking gasoline UST and MTBE, assert that Plaintiff contributed to the contamination on the Property by losing inventory over time because of the inexactitude of the inventory method. However, the Zaman Parties did not produce any evidence to support this theory.

86. Mr. Ansley testified he faithfully performed inventory reconciliation of his gasoline supply at least two to three times per week during the time he operated Larry's ARCO on the Property. (Testimony of Ansley). Mr. Palilla testified to daily inventory reconciliation when he operated Matty's

Service on the Property. The method of inventory reconciliation performed by these two prior operators was the standard industry practice of the day. Further, this was the only practical method of testing for loss of gasoline inventory from 1941 to 1979. (Testimony of Palilla; Ansley; Evenson; and Ross) Neither Mr. Palilla nor Mr. Ansley ever experienced a loss of gasoline inventory during the time they operated ARCO stations on the Property. (Testimony of Palilla; Ansley). The Zaman Parties have offered no evidence to contradict the above testimony of Palilla and Ansley.[27]

87. In contrast to the conduct of Mr. Palilla and Mr. Ansley, the Zaman Parties never conducted gasoline inventory reconciliation and would not have known if they experienced a loss. (Testimony of Behrouz Zaman).

88. The Court finds that the Zaman Parties have presented no credible evidence that the Plaintiff or Mr. Ansley contributed to the gasoline contamination in the southern section of the property. The Court finds that the Zaman Parties are responsible for the gasoline contamination in the southern section of the Property.

3. Waste Oil Contamination.

89. The third major area of contamination on the property is composed of waste oil and is located in the southwest portion of the Property. The waste oil plume extends from a point underneath the garage outward and encompasses the sewer lines to the west of the garage and the 280-gallon waste oil UST and a portion of the westernmost gasoline UST to the east. The waste oil plume has moved beyond the southern boundary of the Property (Ex. 609). The highest concentration of contamination is on the southern edge of the garage (Testimony of Evenson).

90. ARCO asserts that the waste oil contamination is from multiple sources including: (1) naturally occurring crude oil (testimony of Evenson); and (2) waste oil improperly disposed of on the property by the Zaman Parties through

sewer lines, a leaking waste oil UST, a leaking gasoline UST, arid surface contamination. (Testimony of Evenson). Behrouz Zaman admitted that there were four to five oil changes a day for five days a week for the entire period he operated the automotive repair shop on the property (four or five years). There are no records of waste oil disposal during this time. The Crandall Report (Ex. 225), did not show this extensive contamination of waste oil on the Property in September of 1979, merely noting "streaks of oil." The extensive waste oil contamination was not observed on the Property until the later 1980's. (Testimony of Evenson). This additional fact supports ARCO's theory that the Zaman Parties contaminated the property with waste oil.

91. ARCO asserts that the 1979 Crandall Report's (Ex. 225) "streaks of oil," observed in Boring 1, originate from naturally occurring crude oil and not waste oil. (Testimony of Evenson). In support of this, there are a number of previously producing crude oil wells only blocks from the Property. (Ex. 601; Testimony of Evenson). Further, Joshua Ong, a consultant hired by the Zaman Parties, tested the oil and found that the composition of the waste oil was consistent with crude oil.[28] (Testimony of Evenson). Finally, Mr. Ross testified that the existence of oil wells near the Property would effect his decision regarding the nature of contamination on the Property. (Testimony of Ross).

92. In further support of ARCO's theory, Mr. Potter testified that in 1988, 55-gallon drums were being used for waste oil storage on the Property. Mr. Potter observed that these drums were open and spilling waste oil into the subsurface. There are no records for the disposal of this waste oil or any other waste oil on the property.[29] (Testimony of Potter). ARCO's expert, Mr. Evenson, prepared a cross-sectional contour map of the Property, which showed the highest area of concentration was around the sewer lines on the Property. The sewer lines on the property were made of a porous clay material, which cracks and leaks, thereby exposing the Property to any contaminants placed inadvertently or advertently into the sewer. (Testimony of

Evenson) . The toilet fire on the Property in 1990 supports ARCO's theory that contamination was disposed of directly into the property during the time Jamshid Zaman owned the Property. Other sources of waste oil contamination on the Property are the underground waste oil UST and the underground westernmost gasoline UST. A pinhole leak was discovered in the waste oil UST (Exs. 1, 2). The waste oil UST was not equipped with overflow protection or spill containment. (Testimony of Simon) . Heavy waste oil staining was observed around the waste oil and gasoline UST's when they were removed. (Testimony of Simon). ARCO asserts that the Zaman Parties disposed of waste oil into any open receptacle available on the Property. This is supported by Potter's observation of staining around the fill port of the gasoline UST, oil staining underneath the westernmost gasoline UST (Testimony of Simon), and the fact that the plume extends all the way to the gasoline UST (Ex. 609; Testimony of Simon; Stahl).

93. The Zaman Parties assert that the waste oil contamination on the Property originated from two 55-gallon drums found buried beneath the concrete floor of the garage. (Testimony of Lesperance). These two drums were unearthed during soil remediation of the contaminated Property. (Testimony of Stahl) . The Zaman Parties assert that these drums were used for disposal of waste oil directly into the ground and that the drums were completely covered by a concrete floor installed on the Property in 1963 and were no longer used after that date. (Testimony of Lesperance).[30]

94. ARCO asserts that the 55-gallon drums were not used to dispose of waste oil on the property. Instead, ARCO asserts that the drums were installed beneath the concrete floor in the 1963 remodel and were used as "blow-off" drums as part of the underground hoist system. ARCO maintains that any contamination emanating from the area underneath the 55-gallon drums is the result of improper clarifier maintenance by the Zaman Parties. ARCO asserts that improper clarifier maintenance resulted in contaminants backing up into the drums, which were connected to the

clarifier, and waste was disposed of into the ground in this manner. (Testimony of Evenson). The Zaman Parties did show evidence indicating the clarifier was properly maintained.

95. The two 55-gallon drums were discovered during Phase 1 of the remediation in connection with Jamshid Zaman's remodel of the Property. The first drum was discovered by Carlos Stahl of Cal Waste Reductions, Inc., when he was excavating the southern contamination plume. In the course of that remediation, Mr. Stahl yanked the below-ground hoists from the interior of the garage, and removed the garage's concrete floor (Testimony of Stahl) . On February 5, 1999, Mr. Stahl found the first 55-gallon drum ("Drum 1") in the garage area. This drum was damaged by a backhoe during excavation. (Testimony of Stahl). The Zaman Parties' expert, Mr. Lesperance was called to inspect Drum 1. Mr. Stahl believed that he would likely find a second drum at the Property and indeed, he did find a second drum at the Property ("Drum 2"), on February 9, 1999. (Testimony of Stahl). Mr. Lesperance was called to see Drum 2 while it was still in the ground, after the upper third of the drum had been excavated. (Testimony of Lesperance). Mr. Lesperance instructed the Zaman Parties not to take the second drum out until he had come to the Property and taken pictures of the drum. (See, March 12, 2000 Testimony of Jamshid Zaman).

96. Mr. Stahl testified that he immediately believed that the drums were likely a source of waste oil contamination at the Property. (Testimony of Stahl). Mr. Lesperance testified that he determined by "visual observation" that the drums were the cause of soil contamination, and was so certain of this conclusion that he took no samples from inside the drums and only one soil sample from the area of the drums. (March 30, 1999 Testimony of Lesperance). In addition, Mr. Stahl invited James Ross, the Water Board regulator formerly in charge of site assessment and remediation at the Property, to come to the Property to observe the first drum, and told him what he through the drum was. (Testimony of Ross).

97. Mr. Lesperance did not take any samples from inside either drum and only took one soil sample in connection with the drums, a sample taken from the soil below Drum 1. (March 30, 1999 Testimony of Lesperance) . To Lesperance's surprise (as shown in Lesperance's FAX cover sheet to the testing company, requesting the sample be retested), this soil sample showed light end hydrocarbons, inconsistent with waste oil. (Exs. 589; 591) . The soil sample under the drum contained the same approximate range of light end hydrocarbons as observed underneath the clarifier. (Ex. 591; Testimony of Evenson).

98. The Zaman Parties did not notify ARCO or the Ansleys about the discovery of the drums until late February or early March of 1999. As of March 4, 1999 when Mr. Evenson went to the Property to view the drums, the drums had been moved to the western side of the Property, and the excavation had been filled with new material. (March 23, 1999 Testimony of Evenson). At this time, Drum 1 was partially destroyed. Athough Drum 2 was relatively intact, it was covered with a heavy cement cap and was against a wall, preventing Mr. Evenson from visually inspecting all sides of the drum. (March 23, 1999 Testimony of Evenson).

99. On March 4, 1999 and March 5, 1999, counsel for A.RCO sent letters to counsel for the Zaman Parties notifying him that the drums "were evidence in the lawsuit" and asked him "to confirm that the drums at the property will be preserved pending resolution of this lawsuit." (Ss~, ARCO's Motion for Evidentiary Sanctions, Exs. A, B).

100. After discovery of the drums, ARCO produced to the Zaman Parties copies of blueprints from a Richfield service station in Oregon. (Exs. 516 and 516). These blueprints showed the use of two 55-gallon drums used as blow-off drums for an underground hoist system. The blow-off drums were similar to the drums found at the Property in that they both: (1) were 55-gallon drums; and (2) were filled with rocks and had holes punched in the bottom. The drums in the blueprints were connected to the hoists, the clarifier and the

air compressor.

101. On July 8, 1999, after reviewing the blueprints of the "blow-off" drums, Mr. Evenson made another trip to the Property to sample and inspect the drums. (March 29, 2000 Testimony of Evenson). Mr. Evenson found that the drums had been crushed, only half of one of the drums remained and the cement cap had deliberately been removed from Drum 2. (April 14, 2000 Testimony of Lesperance). Jamshid Zaman admitted that he was responsible for compressing the drums. (April 13, 2000 Testimony of Jamshid Zaman). Counsel for the Zaman Parties never notified ARCO of any plans to alter the drums in any manner. (See, ARCO's Motion for Evidentiary Sanctions, Wexler Decl., ¶ 4).

102. It is undisputed that the Zaman Parties knew upon discovery of the drums that the drums were relevant to the litigation. Yet, Plaintiff was never notified of the existence of these drums until after the drums had been removed from the ground. The Zaman Parties then destroyed the drums without notifying Plaintiff.

103. The court finds that the Zaman Parties knew the evidence was relevant to some issue at trial (shown by the fact that they called their own experts to inspect the drums in place) . The Court also finds that the actions of the Zaman Parties deprived ARCO and the Ansleys of a loss of ability to test the soil around the drums, to test inside the drums, and to observe the drums in place. Based on the foregoing, on April 18, 2000, the Court granted ARCO's Motion for Evidentiary Sanctions and found a rebuttable presumption that the sampling, had it been done by ARCO's expert, would have been positive for ARCO and would have been detrimental to the Zaman Parties' theory.

104. Under the Zaman Parties' theory, ARCO or Ansleys' contribution for the waste oil contamination on the Property from the 55-gallon drums is limited to the time prior to the 1963 remodel, but after the station was built in the 1940's (based on the probable age of the drums). (Testimony of

Lesperance).

105. Mr. Ansley began operating the station in 1961, only two years before the 1963 remodel. During these two years, Mr. Ansley conscientiously disposed of his waste oil into a 120-gallon UST located in the service bay. (Testimony of Ansley) Mr. Ansley regularly took inventory of the waste oil UST and called a pump truck to properly remove the waste oil from the Property as needed. (Testimony of Ansley). Mr. Ansley also testified he did not dispose of waste oil directly into the 55-gallon drums and was unaware these drums existed on the Property. The Zaman Parties have not presented any evidence that suggests Mr. Ansley acted contrary to his testimony.

106. Mr. Palilla, the previous operator of the station, also testified that he conscientiously disposed of waste oil into the 120-gallon waste oil UST located in the service bay and regularly had it removed by a pump truck. During the time Palilla operated the station, the operators of the pump trucks would pay for the used oil, providing a financial incentive for proper disposal of the oil. Mr. Palilla testified that he built a shed around the 120-gallon waste oil tank so he would not have to wheel in his lube equipment on a nightly basis. He also testified that his lease with ARCO required that he maintain a clean premises. Mr. Palilla testified he did not dispose of any waste oil into 55-gallon drums, never saw 55-gallon drums in the ground on the property, and did not know of their existence until he was informed as such by ARCO. (Testimony of Palilla). The Zaman Parties have not offered any evidence to contradict the testimony of Mr. Palilla.

107. ARCO asserts the waste oil is in part crude oil and in part post-September 1979 waste oil. The great weight of evidence suggests that the contamination came from sources other than pre-1979 waste oil contamination and that the 55-gallon drums were not. used by ARCO or the Ansleys to dispose of waste oil into the Property. Accordingly, the Court finds that neither ARCO nor the Ansleys are responsible for any of the waste oil contamination on the Property and that

the Zaman Parties are responsible for the waste oil contamination on the Property.[31]

108. Any finding of fact deemed to be a conclusion of law is hereby incorporated into the conclusions of law.

III. CONCLUSIONS OF LAW

A. ARCO's RCRA Claim Against the Zaman Parties.

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question).

2. A.RCO has sued the Zaman Parties for injunctive relief pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("ECRA"), 42 U.S.C. §§ 6901 et. seq.

3. RCRA authorizes an action against "any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972 (a) (1) (B).

4. "[A]ny person" may bring a citizen suit under RCRA, even if that person is a potentially responsible party for the underlying contamination. See Raytheon Co. v. McGraw-Edison Co., 979 F. Supp. 858, 863 (E.D. Wis. 1997).

5. Gasoline and waste oil are considered solid wastes for purposes of RCRA. See Zands v. Nelson, 779 F. Supp. 1254, 126164 (S.D. Cal. 1991) (holding that "the leakage of gasoline from an underground storage tank can create a cause of action under section 6972 (a) (1) (B)"). See also Zands v. Nelson, 797 F. supp. 805, 809-10 (S.D. Cal, 1992) (holding that the gasoline contamination in that case created an imminent and substantial threat of endangerment to health or the environment).

6. The courts have repeatedly held that petroleum-contaminated soil is a "solid waste" for purposes of a claim for injunctive relief brought pursuant to Section 6972 (a) (1) (B). See, e.g.. Aurora Nat'l Rank v. Tri Star Mktg. Inc., 990 F. Supp. 1020, 1027 (N.D. Ill. 1998) ("the petroleum contamination discovered on plaintiff's property constitutes a 'solid waste' within the meaning of the RCRA"); Express Car Wash Corp. v. Irinaga Bros. . Inc., 967 F. Supp. 1188, 1191 (D. Ore. 1997) ("[g]asoline and other petroleum products are hazardous wastes under RCRA"); Waldschmidt v. Amoco Oil Co., 924 F. Supp. 88, 89-91 (C.D. III. 1996) (holding that "petroleum contamination from Defendant's service station constitutes a solid waste under section 6972(a) (1) (B)"); Craig Lyte Ltd. Partnership v. Land O'Lakes Inc., 877 F. Supp. 476, 480-82 (D. Minn. 1995) ("spilt or leaked petroleum resulting from commercial operations satisfies RCRA'S definition of 'solid waste'"). See also February 1, 2000 Minute Order at 1 ("find[ing] that petroleum products, which include oil, constitute solid waste for RCRA purposes" and stating that "[i]n so doing, the Court joins the nearly unanimous position of the district courts that have considered this issue").

7. Under 42 U.S.C. § 6921, Congress "delegat[ed] to the EPA the task of promulgating regulations identifying the characteristics of hazardous waste and listing specific wastes as hazardous" [i.e., as RCRA compounds] for purposes of the "cradle-to-grave" regulatory structure established by subtitle C of RCRA, 42 U.S.C. §§ 6921-6939b. Natural Resources Defense Council, Inc. v. United States Environ. Protection Agency, 25 F.3d 1063, 1065 (D.C. Cir. 1994). The EPA has determined that used oil did not need to be specifically listed as a "hazardous waste" for purposes of subtitle C. See id. at 1065-67.

8. The fact that used oil is not a "hazardous waste" for purposes of subtitle C of RCRA does not mean that waste oil is not actionable under Section 6972 (a) (1) (B). To the contrary, Section 6972 (a) (1) (B) authorizes a private right of action for injunctive relief based upon the handling of

"any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. S 6972 (a) (1) (B) (emphasis added) As the cases cited above demonstrate, waste oil is actionable under RCRA as a "solid waste" even if it is not necessarily a "hazardous waste" for purposes of that statute. See February 1, 2000 Minute Order at 1.

9. "[T]he 'passive' leaching or migration of hazardous substances constitutes 'disposal' within the meaning" of RCRA (and CERCLA, which incorporates the definition of "disposal" included in 42 U.S.C. § 6903(3), See 42 U.S.C. § 9601(29)). Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 662-64 (E.D. Cal. 1990) See e.g., United States v. Waste Indus., Inc., 734 F.2d 159, 164-65 (4th Cir. 1984) ("movement of the [hazardous] waste after it has been placed in a sense of repose [is] encompassed in the broad definition of disposal" included in RCRA) ; Acme Printing Ink Co. v. Menard. Inc., 812 F. Supp. 1498, 1512 (E.D. Wis. 1992) ("leaking of hazardous substances may constitute a continuous or intermittent violation of RCRA"); CPC Int'l. Inc. v. Aerojet-General Corp , 759 F. Supp. 1269, 1277-78 (W.D. Mich. 1991) ("the unchecked spread of contaminated groundwater . . . qualifies as disposal" for purposes of CERCLA]. See also April 14, 1997 Order re The Zaman Defendants' Motion for Judgment on the Pleadings and Remand to State Court (the "April 14 Order") at 13:14 - 16:8.

10. As the Ninth Circuit has explained, the "imminent and substantial endangerment" standard is not particularly stringent:

> A finding of "imminency" does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." ... Imminence refers "to the nature of

> the threat rather than identification of the time when the endangerment initially arose." . .
>
> Moreover, a finding that art activity may present an imminent and substantial harm does not require actual harm. . . . Courts have consistently held that "endangerment" means a threatened or potential harm and does not require proof of actual harm. However, at the very least, endangerment or a threat must he shown.
>
> . . . The RCRA provision implies that there must be a threat which is present now, although the impact of the threat may not be felt until later. Also, endangerment must be substantial or serious, and there must be some necessity for the action.

Price v. United States Navy, 39 F.3d 1011, 1019 (9th Cir. 1994) (citations omitted). See, e.g., Davis v. Sun Oil Co., 148 F.3d 606, 609-10 (6th Cir.) (same), cert. denied, 525 U.S. 1018 (1998) . See also Kara Holding Corp. v. Getty Petroleum Mktg., Inc., 67 F. Supp. 2d 302, 310 (S.D.N.Y. 1999) ("[t]he operative word in section 6972(a) (1) (B) is 'may,' however, and a plaintiff 'need not establish "an incontrovertible 'imminent and substantial' harm to health and the environment"'") (citation omitted).

11. The Zaman Parties are liable under RCRA because the gasoline and waste oil contamination at the Property, unless remediated, is likely to continue to migrate to adjacent properties, and will continue to pose an imminent or substantial threat to health or the environment.

B. The Zaman Parties' Defenses.

1. Unclean Hands.

12. There is no merit to the Zaman Parties' defense of unclean hands. "Application of the unclean hands doctrine requires a finding of inequitableness or bad faith by the party" against whom unclean hands is invoked. Rent-a-Center, Inc. v. Canyon Television & Appliance Rental. Inc., 944 F.2d 597, 602 (9th Cir. 1991). See, e.g., S & R Corp. v. Jiffy Lube Int'l. Inc., 968 F.2d 371, 377 n.7 (3d Cir. 1992) (" [t]o prevail on an unclean hands defense, the defendant must show fraud, unconscionability, or bad faith on the part of the plaintiff").

12. "The doctrine of unclean hands applies only when the plaintiffs allegedly unclean conduct was willful or fraudulent. Mere negligence is not sufficient." Chitkin v. Lincoln Nat'l Ins. Co., 879 F. Supp. 841, 854 (S.D. Cal, 1995) (citing Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co., 324 U.S. 806, 815 (1945)).

13. Unclean hands does not bar ARCO's RCRA claim. There is no evidence of any alleged willful or fraudulent misconduct on the part of ARCO. To the contrary, the evidence demonstrates that ARCO acted in good faith in commencing site assessment and remediation at the Property in the belief that the parties would be entering a comprehensive agreement to share assessment and remediation costs.

2. Laches.

14. "To successfully invoke the defense of laches, an individual must show there was inexcusable delay in the assertion of a known right and that the party asserting laches has been prejudiced." Trustees for Alaska Laborers v. Ferrell, 812 F.2d 512, 518 (9th Cir. 1987) (emphasis added). See. e.g., Brown v. Continental Can Co., 765 F.2d 810, 814 (9th Cir. 1985) ("[t]o establish laches the defendant must show both an unexcused or unreasonable delay by the plaintiff and

prejudice to himself").

15. There is no merit to the Zaman parties' affirmative defense of laches. For purposes of laches, the period of settlement negotiations is not considered unreasonable delay. See e.g., Piper Aircraft Corp. v. Wag-Aero. Inc., 741 F.2d 925, 932 (7th Cir. 1984); Varitronics Sys., Inc. v. Merlin Equip., Inc., 682 F. Supp. 1203, 1209 (S.D. Fla. 1988)

16. Laches does not bar ARCO's RCRA claim because the Zaman Parties have shown neither undue delay nor prejudice.

C. Injunctive Relief.

17. Under RCRA, the Court has the power "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in (Section 6972 (a) (1) (B)], to order such person to take such other action as may be necessary, or both." 42 U.S.C. S 6972(a) (emphasis added). See Price v. United States Navy, 818 F. Supp. 1323, 132S (S.D. Cal. 1992) (interpreting the language of Section 6972(a) to mean that "the court can grant affirmative relief, if necessary, to abate an imminent and substantial endangerment"). See also United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982) (Congress "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes") (discussing 42 U.S.C. § 6973, the parallel provision allowing RCRA lawsuits by the Environmental Protection Agency)

18. The Court exercises its broad equitable powers under 42 U.S.C. S 6972(a) to impose injunctive relief: (1) prohibiting the Zaman Parties from engaging in any activity at the Property which may result in the release of gasoline or waste oil at the Property; and (2) requiring the Zaman Parties to act within 30 days from service of the Permanent

Injunction to take all affirmative steps necessary to remediate the gasoline and waste oil contamination at the Property to a level at which it no longer poses a threat to the groundwater and neighboring properties. Specifically, within 30 days of service of the Permanent Injunction the Zaman Parties are to: (1) begin phase 2 of remediation; and (2) submit a Status Report to the Court indicating the current status of Phase 3 of remediation with the Water Board and a proposed start date for remediation.[32]

D. All Parties' Claims for Declaratory Relief.

19. All parties seek declaratory relief concerning their respective rights and liability with regard to the gasoline and waste oil contamination at the Property.

20. Under 28 U.S.C. § 2201(a), "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Id.

21. There is a current case or controversy because ARCO, the Zaman Parties, and the Ansleys all deny that they are liable for the contamination at the Property, and contend that other parties are responsible for the contamination at the Property.

22. The Court declares that the Zaman Parties are responsible for 100 percent of the gasoline contamination in the northern portion of the Property, 100 percent of the gasoline contamination in the southern portion of the Property, and 100 percent of the waste oil contamination in the southern portion of the Property.[33]

23. The Court declares that ARCO is not responsible for any of the gasoline contamination in the northern portion of the Property, any of the gasoline contamination in the southern portion of the Property, or any of the waste oil contamination in the southern portion of the

Property.

24. The Court declares that the Ansleys are not responsible for any of the gasoline contamination in the northern portion of the Property, any of the gasoline contamination in the southern portion of the Property, or any of the waste oil contamination in the southern portion of the Property.

E. The Zaman Parties' Claims for Continuing Trespass and Nuisance.

1. In General.

25. "'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. . . A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession.'" Capogeannis v. Superior Court, 12 Cal. App. 4th 668, 674, 15 Cal. Rptr. 2d 796 (1993) (quoting Wilson v. Interlake Steel Co., 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922 (1982)).

26. The three-year statute of limitations of Cal. Civ. Proc. Code § 338(b) governs the Zaman Parties' claims for continuing trespass and continuing nuisance. Accordingly, the Zaman Parties' potential recovery on those claims is limited to actual injury suffered within the three years prior to the commencement of the action. See. e.g., Baker v. Burbank Glendale-Pasadena Airport Auth., 39 Cal. 3d 862, 869, 218 Cal. Rptr. 293 (1985) , cert. denied, 475 U.S. 1017 (1986) Capogeannis, 12 Cal. App. 4th at 675-76, 15 Cal. Rptr. 2d 796.

27. Cal. Civ. Proc. Code § 337.15 bars the recovery of damages based upon any injury to property resulting from a latent deficiency in the construction of art improvement to real property where a lawsuit is filed more than 10 years after the substantial completion of the improvement. See Chevron

U.S.A. Inc. v. Superior Court 44 Cal. App. 4th 1009, 1015-19, 54 Cal. Rptr. 2d 323 (1994) (applying Section 337.15 to bar a claim for continuing nuisance based upon the allegedly negligent installation of a UST). Because any construction work performed by or on behalf of ARCO was substantially completed far more than 10 years before suit was filed, the statute of limitations bars any claim based upon any allegedly negligent construction of the gasoline or waste oil systems at the Property.

28. Both trespass and nuisance require conduct that is intentional, reckless, negligent, or ultrahazardous. See e.g., Resolution Trust Corp. v. Rossmoor Corp., 34 Cal. App. 4th 93, 100, 40 Cal. Rptr. 2d 328 (1995) (trespass); Mikkelsen v. State of California, 59 Cal. App. 3d 621, 628, 130 Cal. Rptr. 780 (1976) (nuisance); Lussier v. San Lorenzo Water Dist., 206 Cal. App. 3d 92, 102, 253 Cal. Rptr. 470 (1988) (nuisance); Reinhard v. Lawrence Warehouse Co., 41 Cal. App. 24 741, 746, 41 (1940) (interpreting Cal. Civil Code § 3483 as requiring intent which presupposes knowledge to impose liability for continuing nuisance).

29. For two reasons, the Zaman Parties may not predicate their claims for continuing trespass and continuing nuisance upon a theory of ultrahazardous activities.

30. First, '[w]here USTs are buried beneath gasoline stations located in commercial settings, the overwhelming majority of courts have concluded that such conduct is not 'abnormally dangerous.'" National Tel Co-op Ass'n v. Exxon Corp., 38 F. Supp. 2d 1, 8 (D.D.C. 1998) (citing numerous cases). See, e.g., Arlington Forest Assocs. v. Exxon Corp., 774 F. Supp. 387, 389-93 (E.D. Va. 1991).

31. Second, the case law recognizes that the doctrine of strict liability for abnormally dangerous or ultrahazardous activities does not apply in suits brought by a property owner against prior owners of the same property. See, e.g., Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp. 2d 391, 417-420 (M.D. Pa. 1998); Jones v. Texaco, Inc.,

945 F. Supp. 1037, 1050-52 (S.D. Tex. 1996)

32. Accordingly, in order to prevail on their claims for continuing trespass and continuing nuisance, the Zaman Parties must show intentional, reckless, or negligent conduct, and cannot rely upon theories of strict liability.

2. The Zaman Parties' Continuing Trespass and Continuing Nuisance Claims Against ARCO.

33. There is no California case law holding a lessor landowner liable for either nuisance or trespass "where the landlord was not an active participant in causing the fuel leak and contamination." Resolution Trust Corp. v. Rossmoor Corp., 34 Cal. App. 4th at 99-100, 40 Cal. Rptr. 2d 328. "The absence of cases finding landowners liable for trespass without their active participation is presumably because trespass requires an act which is intentional, reckless, negligent or the result of ultrahazardous activities." Id. at 100, 40 Cal. Rptr. 2d 328.

34. Where a property owner has the power to remedy dangerous conditions at leased property, it has a duty to act to remedy those conditions, provided, however, that it must first know or have reason to know of the specific dangerous condition. See id. at 102-04, 40 Cal. Rptr. 2d 328. A property owner does not have a duty to act based solely upon its knowledge that a gasoline station will be operated on the leased property and that some potential for leakage is inherent in the business. See id. at 103, 40 Cal. Rptr. 2d 328.

35. ARCO is not liable for continuing trespass or nuisance because the Zaman Parties did not carry their burden of proof. Specifically, the Zaman Parties: (1) did not show that any of the contamination at the Property postdated ARCO's involvement with the Property (aside from the pre-September 1979 groundwater contamination in the northern part of the Property attributed to off-site migration); (2) did not produce any evidence showing that ARCO acted intentionally, negligently, or recklessly; and (3) produced no

evidence showing ARCO had knowledge or reason to know of any gasoline leakage at the Property and therefore ARCO had neither the duty nor power to act.

3. The Zaman Parties' Continuing Trespass and Continuing Nuisance Claims Against Ansleys.

36. The Ansleys are not liable for continuing trespass or nuisance because the Zaman Parties did not carry their burden of proof. Specifically, the Zaman Parties: (1) did not show that any of the contamination at the Property postdated the Ansleys' involvement with the Property (aside from the pre-September 1979 groundwater contamination in the northern part of the Property attributed to off-site migration); (2) did not produce any evidence showing that the Ansleys acted intentionally, negligently, or recklessly; and (3) produced no evidence showing the Ansleys had knowledge or reason to know of any gasoline leakage at the Property and therefore, the Ansleys had neither the duty nor power to act.[34]

F. ARCO and the Ansleys' Defense of Failure to Mitigate.

37. A plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion, nor may the plaintiff recover for increased loss due to the plaintiff's own conduct. See, e.g., Valle de Oro Bank v. Gamboa, 26 Cal. App. 4th 1686, 1691, 32 Cal. Rptr. 2d 329 (1994) ("[a] plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion"); Mayes v. Sturdy Northern Sales, Inc., 91 Cal. App. 3d 69, 85-86, 154 Cal. Rptr. 43 (1979) ("[i]ncreased loss due to the plaintiff's willfulness or negligence is the plaintiff's own burden"); Lewis v. Superior Court, 77 Cal. App. 3d 844, 853, 144 Cal. Rptr. 1 (1978) ("[i]f plaintiff, by her own action, unnecessarily enhances her loss she may not recover for such enhanced loss").

38. The Zaman Parties failed to mitigate their damages because they knew of the contamination at the Property in 1979, yet failed for many years to take any steps

to remediate the contamination. As a result, the gasoline and waste oil contamination at the Property continued to migrate, increasing the necessary scope of remediation.

39. Any conclusion of law deemed to be a finding of fact is hereby incorporated into the findings of fact.[35]

SO ORDERED

DATED: 5/3/2000

AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

Footnotes

[1] This case was tried for two hours per day pursuant to an agreed upon schedule to accommodate the Court's injury.

[2] The Court acknowledges with thanks the extensive settlement efforts expended from 1997 to 1999 by Magistrate Judge Andrew Wistrich.

[3] The Court received the testimony of Eli Ebrahimi by way of videotaped excerpts of deposition testimony.

[4] The Ansley's also utilized Mr. Evenson as their expert witness.

[5] After extensive testimony, the Court finds that the standard form of inventory reconciliation used by Palilla (use of inventory sticks) was a reliable indicator over time of whether gasoline and waste oil were being lost.

[6] See footnote 4, above. Mr. Ansley disposed of his records a number of years after he sold the station. The Court finds this to be entirely reasonable. He was not notified of any contamination until his attorney sent him a letter in 1986. (See, March 9, 2000 Testimony of Ansley; Deposition Testimony of Ansley at 51).

[7] Mr. Ansley testified he stayed on at the service station for about two weeks to show Mr. Behrouz Zaman (the brother of Jamshid Zaman) how to operate the station. Mr. Ansley testified he demonstrated the proper techniques for gasoline inventory reconciliation, waste oil inventory, and waste oil disposal from the garage into the underground UST. No loss of gasoline inventory was discovered during this time. (Testimony of Ansley). This testimony was not disputed by Behrouz Zaman. However, Jamshid Zaman testified he did not operate the station until sometime in October of 1979. This is not supported by the following facts: 1) Jamshid Zaman signed the UST Fund containing a penalty of perjury and listed the date of operation as September 20, 1979 (Ex.'s 1; 2) a delivery of gasoline to the Property in September of 1979 (Ex. 503); and 3) a letter dated September 11, 1979 and signed by Jamshid Zaman, from LeRoy Crandall and Associates, stating the Property "is an operating gasoline station." (Ex. 304).

[8] Jamshid Zaman did not have any testing of any kind done while in escrow.

[9] MTBE (methyl-tert-butylether) was first introduced in Southern California in the late 1980's by ARCO. (Testimony of Lindemulder). The introduction of MTBE as a gasoline additive coincided with the phase-out of organic lead as a gasoline additive. Thus, MTBE serves as a marker to date gasoline released into the environment to a time after the late 1980's. (Testimony of Lindemulder). However, leaded gasoline was continually sold and delivered to the property during the entire time all of the parties operated the Property as a gasoline station. Thus, the presence of lead in the gasoline contamination does not serve as a marker to assign liability to either party.

[10] In fact, Potter testified that in his experience (ten years) the site had the highest level of waste oil look-alike contamination that he had ever seen on a site.

[11] Although Jamshid Zaman testified that he submitted a canceled check for the correct (lower) amount to the Fund,

he was unable to identify it during his testimony and was never recalled on this point. More importantly, even if he submitted the proper canceled check, he did not testify that he ever returned the overpayment to the Fund. (April 13, 2000 Cross-examination of Jamshid Zaman).

[12] The Zaman Parties have argued that this Court's grant of the Zaman Parties' Motion for Summary Judgment on ARCO's oral and written contract: claims proves that ARCO did not deal with Jamshid Zaman in good faith. Ironically, the facts indicate that the opposite is closer to the truth. It is true that ARCO's breach of oral contract claim was dismissed, but that was because ARCO could not produce admissible evidence after the passage of years that any specific ARCO employee secured an oral promise from Jamshid Zaman to split the costs of site assessment with ARCO. Yet, it is clear from the Zaman Parties' admissions (Ex. 519 - Answer at ¶ 19) that there was an agreement of some kind with ARCO. As for the breach of written contract, ARCO produced various cost-splitting agreements that it asked Jamshid Zaman to sign. By the time these agreements were prepared, ARCO had already expended money on assessment. Jamshid Zaman refused to sign. Instead of refusing to proceed with the site assessment. and cleanup until Jamshid Zaman signed an agreement, ARCO proceeded with its work, including the removal of 2,000 gallons of petroleum product from the Property. As a result, the Zaman Parties won the battle on the ARCO's contract claims at the summary judgment stage. However, the Court finds that the facts indicate ARCO's good faith in cleaning up the site.

[13] There is some confusion on the part of Mr. Lesperance as to whether it was free-phase oil or gasoline product that was removed. (See April 11, 2000 Testimony of Lesperance at 979-980). Thus the term "petroleum product" is used herein and may represent either gasoline, waste oil, or both.

[14] See ¶ 35.

[15] The Zaman Parties would be reimbursed by the UST Fund for the cost of Phase 2 and 3 of the remediation. In fact, the Court continued this trial to allow a reasonable time for completion of remediation, so that the costs would be certain. The Zaman Parties have declined to engage in any remediation since the completion of Phase 1 in early 1999. This is despite approval from the Water Board and a contractor ready and willing to proceed (i.e., Carlos Stahl of Cal Waste). The Court finds this refusal to engage in remediation stems from the Zaman Parties' desire to maximize profits by recovering damages above and beyond those reimbursable from the UST Fund by pursuing this lawsuit against ARCO. The Zaman Parties have attempted to maximize their damages in this litigation by: (1) projecting unrealistic costs for future cleanup; (2) claiming damages from emotional distress as a result of the contamination; (3) claiming damages from emotional distress from a bankruptcy allegedly caused by contamination on the property (stricken by the Court in Motion in Limine) ; (4) claiming lost rent; (5) claiming lost profits; (6) claiming damage from tank removal costs; (7) claiming substantially more in past costs than the $225,000 recovered from the UST Fund.

[16] The Court rejects Jamshid Zaman's testimony (April 13, 2000) that he is waiting for approval of the Water Board to continue with the next phase, as this is contradicted by both the exhibits and defense witnesses Stahl and Lesperance.

[17] In fact, the Zaman Parties have asserted that further remediation of the site is not necessary. (Testimony of Lesperance). This assertion contradicts the wealth of evidence presented by ARCO that the Property does in fact need to be remediated to: 1) minimize the danger it presents to human health and the environment; and 2) limit migration of the contaminants off-site. (Testimony of Evenson).

[18] The Zaman Parties assert that the concentration of gasoline contamination on the property is actually decreasing over time. (Testimony of Lesperance) . The court finds this argument lacks credibility. The Zaman Parties correctly

assert that there is less contamination on the Property than was observed in the 1980's. However, the Zaman Parties fail to acknowledge the reason for the decreased contamination – that the contamination has moved to other adjoining Properties. The evidence suggests that the total contamination has not decreased, but merely has spread over a larger area and moved off-site. (Testimony of Evenson; Exs. 606; 608).

[19] See ¶ 19, infra.

[20] The credibility of this witness is discussed above.

[21] In fact, in the Zaman Parties' opening statement, counsel stated the Zaman Parties would show evidence from the EPA that stated lead had to be phased out by 1979 and MTBE was to be used after 1979.

[22] The Zaman Parties' attempt to assign liability to Plaintiffs based on the presence of organic lead in the contaminated groundwater samples in the northern portion of the Property is unavailing. (Testimony of Lesperance). Organic lead was added to gasoline as an octane enhancer until the late 1980's and sold throughout Southern California. (Testimony of Lindemulder). . Thus, the presence of organic lead in the gasoline does not sufficiently date the gasoline to a time predating the Zaman Parties' ownership of the Property i.e., August of 1979) or preclude off-site migration as a potential source of contamination .

[23] The Court finds this testimony is not credible. Mr. Ansley testified he stayed on for two weeks after the sale of the property to Jamshid Zaman and helped run the station. Other evidence supports Plaintiff's assertion that Jamshid Zaman was operating the station 20 days before this line was capped. See, Note 6, infra.

[24] This theory was later discredited when Lesperance admitted under Plaintiff's cross-examination that if leaded gasoline was sold after 1979 and MTBE was not included in

gasoline until the late 1980's, his theory regarding the source of contamination would change. It was shown by ARCO that indeed, leaded gasoline was sold after 1979 and delivered to the property and MTBE was not sold until 1989 in Southern California, thus undermining Lesperance's opinion. (Testimony of McGetrick)

[25] The Zaman Parties do not dispute that this line was capped. Instead, the Zaman Parties assert that this line was a leaded line and therefore could not be the cause of the contamination. However, whether the line was leaded or unleaded and was switched in October of 1979, as Plaintiff suggests, thereby contaminating the property, is not dispositive of the source of contamination. The primary factor Is that the soil was not contaminated in September of 1979, and was completely contaminated in 1987. Thus, Mr. Ansley sold the property uncontaminated to the Zaman Parties in August of 1979 and it was contaminated by them sometime after September of 1979. Whether it was in October of 1979 as Plaintiff suggests, or at a later date, the contamination was still the result of the Zaman Parties actions and not the Plaintiffs.

[26] See, note 9, infra.

[27] The Zaman Parties have offered testimony that small amounts of inventory could be lost over time which would not have been detected due to the inaccuracy of the inventory reconciliation method. (Testimony of Ross). This argument is (fn continued) unavailing. First, the Court specifically finds, based on the evidence, that the loss of inventory would be discovered over time. Second, the Court finds Ansley's and Palilla's inventory control practices were consistent with the industry standards and their conduct did not breach their duty of due care. Thus, even if the Zaman Parties' theory of contamination on the Property were correct, this would not amount to negligence on the part of Mr. Ansley or Mr. Palilla. Asserting that the prior station operators may have unknowingly contaminated the Property, even though they dutifully practiced gasoline inventory control, is not enough

to attach liability. "The defendant must be aware of the specific dangerous condition and be able to do something about it before liability will attach." Resolution Trust Corp. v. Rossmoor, 34 Cal. App. 4th 93, 103, 40 Cal. Rptr. 2d 333.

[28] Mr. Lesperance disputed the findings of Joshua Ong based on the sampling technique used by Mr. Ong (i.e., the sample was not purged, the preferred mode of testing) . (Testimony of Lesperance). . However, the undisputed testimony in support of ARCO's theory is that any error from a failure to purge is likely to result in a showing of waste oil rather than crude oil. Here, the test showed crude oil. (Testing of Evenson; Ross)

[29] The single exception to this is the receipt produced by Behrouz Zaman during his testimony. This receipt was dated in 1988, after the Property was contaminated, and was for an above ground waste-oil tank.

[30] It is undisputed that the drums could not have been used for waste oil disposal after the 1963 remodel, which placed a concrete floor above the drums.

[31] Neither party is responsible for the portion of the contamination on the Property attributable to naturally occurring crude oil.

[32] Atlantic Richfield is Ordered to prepare and serve upon the court and the Zaman parties a Proposed Permanent Injunction consistent with these Findings of Fact and Conclusions of Law within seven days of receipt of this Order. The Zaman Parties will have three days after service of the Proposed Preliminary Injunction to file and serve Atlantic Richfield and the court with Objections as to form.

[33] The Zaman Parties are not responsible for the portion of the oil contamination on the Property attributable to naturally occurring crude oil.

[34] In accordance with the above, the Ansleys were dismissed from this lawsuit on a Rule 52(c) Motion for Judgment on Partial Findings on April 18, 2000. The Ansleys' claim for Equitable Indemnity against ARCO was accordingly dismissed at this time upon Motion by the Ansleys.

[35] Atlantic Richfield is Ordered to submit a Final Judgment in favor of Atlantic Richfield and the Ansleys consistent with these Findings of Fact and Conclusions of Law.

FILED

MAR 12 2002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 00-56490

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Plaintiff-counter-defendant-cross-defendant - Appellee,

v.

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN INC., a California Corporation dba Beverly Hills Motorworks; AFFORDABLE CARS INC., a California Corporation,
Defendants-counter-claimants-Appellants,

FOX & FIELDS, a general partnership dba Atlas Leasing Group Inc.; ROBERT J. FOX; JERRY FIELDS; LAWRENCE R. ANSLEY, SR.; MARGARET ANSLEY,
Counter and cross-claim defendants - Appellees.

Filed March 12, 2002

ORDER

Before: BRIGHT,* KOZINSKI, and W. FLETCHER, Circuit Judges.

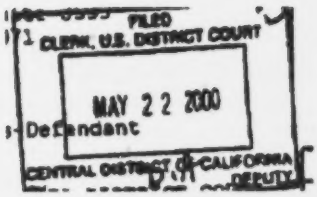
The panel has voted unanimously to deny the petition for rehearing. Judge Kozinski and Judge W. Fletcher voted to deny the petition for rehearing en banc.

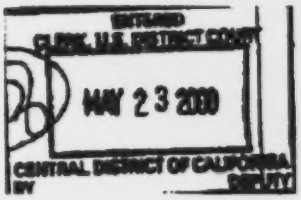
The full court has been advised of the petition for an en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

Footnote

*The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.





Case No. CV95-0566 ABC (AJWx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,
Plaintiff,

v.

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN INC., a California Corporation dba Beverly Hills Motorworks; AFFORDABLE CARS INC., a California Corporation,
Defendants.

Filed May 22, 2000 Entered May 23, 2000

FINAL JUDGMENT AND PERMANENT INJUNCTION

This action came on for trial before the Court from March 7, 2000 through April 19, 2000, the Honorable Audrey B. Collins presiding. The issues having been tried, the Court having filed its Findings of Fact and Conclusions of Law, and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

I. ATLANTIC RICHFIELD'S CLAIM FOR INJUNCTIVE RELIEF UNDER RCRA AGAINST THE ZAMAN PARTIES.

On the First Claim for Relief of Plaintiff, Counterdefendant, and Cross-Defendant Atlantic Richfield Company ("Atlantic Richfield") against Defendants, Counterclaimants, and Counterdefendants Jamshid Zaman, Mahvash Zaman, Behrouz Zaman, and Affordable Cars, Inc., d/b/a Black-and-white Rent-a-Car ("Black-and-White Rent-a-Car"), and Defendant Zaman, Inc., d/b/a Beverly Hills Motorworks, and each of them (collectively, the "Zaman Parties"), for injunctive relief pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et the Court finds that the Zaman Parties are liable under RCRA and that the gasoline and waste oil contamination at the property located at 8800 Burton Way, Beverly Hills (the "Property"), unless remediated, is likely to continue to migrate to adjacent properties, and will continue to pose an imminent or substantial threat to health or the environment. Therefore, and in accordance with the Findings of Fact and Conclusions of Law,

(1) the Zaman Parties, and their officers, agents, servants, employees, and attorneys, along with those persons in active concert or participation with them who receive actual notice of this Final Judgment and Permanent Injunction by personal service or otherwise, are prohibited from engaging in any activity at the Property which may result in the release of gasoline or waste oil at the Property; and

(2) the Zaman Parties shall, within thirty (30) days of service of this Final Judgment and Permanent Injunction, act to take all affirmative steps necessary to remediate the gasoline and waste oil contamination at the Property to a level at which it no longer poses a threat to the groundwater and neighboring properties. Specifically, the Zaman Parties must, within thirty (30) days of service of this Final Judgment and Permanent Injunction; (a) begin what has been described as Phase 2 of the remediation (i.e., the clean-up of the contaminated soil in the northern portion of the Property) ; and (b) submit a Status Report to the Court

indicating the current status of what has been described as phase 3 of remediation (i.e., removal of groundwater contamination at the Property) with the Regional Water Quality Control Board and a proposed start date for remediation.

II. THE CLAIMS OF ATLANTIC RICHFIELD,, THE ZAMAN PARTIES (EXCEPT BLACK-AND-WHITE RENT-A-CAR), AND THE ANSLEYS FOR DECLARATORY RELIEF.

On (A) Atlantic Richfield's Second Claim for Relief against the Zaman Parties for declaratory relief, (B) the Zaman Parties' Fourth Claim for Relief against Atlantic Richfield and Counterdefendants, Counterclaimants, and Cross-Claimants Lawrence R. Ansley, Sr. and Margaret Ansley (collectively, the "Ansleys") for declaratory relief, and (C) the Ansleys' Second Counterclaim against the Zaman Parties for declaratory relief and their Second Cross-claim against Atlantic Richfield for declaratory relief, in accordance with the Findings of Fact and Conclusions of Law,

Pursuant to 28 U.S.C. § 2201(a), THIS COURT DECLARES that:

(1) The Zaman Parties are responsible for 100 percent of the gasoline contamination in the northern portion of the Property, 100 percent of the gasoline contamination in the southern portion of the Property, and 100 percent of the waste oil contamination in the southern portion of the Property (but are not responsible for the portion of the oil contamination on the Property attributable to naturally occurring crude oil)

(2) Atlantic Richfield is not responsible for any of the gasoline contamination in the northern portion of the Property, any of the gasoline contamination in the southern portion of the Property, or any of the waste

oil contamination in the southern portion of the Property; and

(3) The Ansleys are not responsible for any of the gasoline contamination in the northern portion of the Property, any of the gasoline contamination in the southern portion of the Property, or any of the waste oil contamination in the southern portion of the Property.

III. THE COUNTERCLAIMS OF THE ZAMAN PARTIES (EXCEPT BLACK-ANDWHITE - RENT-A-CAR FOR CONTINUING TRESPASS AND CONTINUING NUISANCE AGAINST ATLANTIC RICHFIELD AND THE ANSLEYS.

The Zaman Parties, and none of them, shall take anything by way of their First and Second Claims for Relief against Atlantic Richfield and the Ansleys for continuing trespass and continuing nuisance.

IV. THE COUNTERCLAIMS OF BLACK-AND-WHITE RENT-A-CAR FOR CONTINUING TRESPASS, CONTINUING NUISANCE, AND DECLARATORY RELIEF AGAINST ATLANTIC RICHFIELD AND THE ANSLEYS.

Black-and-White Rent-a-Car's First, Second, and Fourth Claims for Relief against Atlantic Richfield and the Ansleys for continuing trespass, continuing nuisance, and declaratory relief are dismissed with prejudice.

V. ATLANTIC RICHFIELD'S CLAIMS FOR BREACH OF CONTRACT, ACCOUNT STATED, AND MONEY PAID AGAINST JAMSHID ZAMAN.

Atlantic Richfield shall take nothing by way of its Third, Fourth, and Fifth Claims for Relief against Jamshid Zaman for breach of contract, account stated, and money paid, in accordance with the Court's March 17, 1999 Order re: The

Zaman Parties' Motion to Dismiss or Alternatively for Partial Summary Judgment.

VI. THE ZAMAN PARTIES' COUNTERCLAIM FOR INDEMNITY AGAINST THE FOX AND FIELDS PARTIES.

The Zaman Parties shall take nothing by way of their Third Claim for Relief against Counterdefendants, Cross-Claimants, and Cross-Defendants Fox and Fields, Robert J. Fox, and Jerry Fields (collectively, the "Fox and Fields Parties") for indemnity, in accordance with the December 6, 1999 Order re: Motion for Summary Judgment by Fox and Fields, a General Partnership Consisting of Robert 3J. Fox and Jerry Fields, and Doing Business as Atlas Leasing Company, Robert J. Fox, an Individual, and Jerry Fields, an Individual.

VII. COSTS.

(1) Atlantic Richfield shall recover from the Zaman Parties, and each of them, its costs of suit incurred in this action;

(2) the Ansleys shall recover from the Zaman Parties, and each of them, their costs of suit incurred in this action; and

(3) the Fox and Fields Parties shall recover from the Zaman Parties, and each of them, their costs of suit incurred in this action.

DATED: May 22, 2000

Audrey B. Collins,
United States District Judge

Presented by

TUTTLE & TAYLOR, A Law Corporation
LOUIS E. KEMPINSKY
JEFFREY D. WEXLER
KATHERINE PERKINS ROSS

By: JEFFREY D. WEXLER, Attorneys
for Plaintiff, Counterdefendant
and Cross-Defendant
ATLANTIC RICHFIELD COMPANY

ARTICLE III, SECTION 2 OF THE U.S. CONSTITUTION

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;-between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 USC Sec. 6972

TITLE 42- THE PUBUC HEALTH AND WELFARE
CHAPTER 82- SOLID WASTE DISPOSAL
SUBCHAPTER VII- MISCELLANEOUS PROVISIONS

Sec. 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf - (1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or

operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

* * *

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an

award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(2)

Supreme Court, U.S.
FILED
AUG 19 2002
OFFICE OF THE CLERK

No. 02-93

In the Supreme Court of the United States

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN, INC., a California corporation, d/b/a BEVERLY HILLS MOTORWORKS; and AFFORDABLE CARS, INC., a California corporation,
Petitioners,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware corporation; FOX & FIELDS, a general partnership; ROBERT J. FOX, an individual; JERRY FIELDS, an individual; LAWRENCE R. ANSLEY, SR., an individual; and MARGARET ANSLEY, an individual,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT ATLANTIC RICHFIELD COMPANY'S BRIEF IN OPPOSITION

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Where the undisputed evidence established, as both lower courts found, that Respondent Atlantic Richfield Company ("Atlantic Richfield") had a direct pecuniary and personal stake in the underlying litigation, did Atlantic Richfield have Article III standing to maintain suit under 42 U.S.C. § 6972, the citizen-suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq*.?

2. Does the attorneys' fee provision of RCRA unfairly advantage the plaintiff in a RCRA lawsuit when the defendant may, if it is an aggrieved party, assert its own claim under RCRA (either as a counterclaim, cross-claim, or otherwise) and, if it prevails, recover attorneys' fees under the same standard applicable to a prevailing plaintiff?[1]

---

[1] Although this is an issue raised in the body of the Petition for Writ of Certiorari, it was not an issue raised before either of the lower courts, nor was it designated as a question presented for review. It should therefore not be considered by the Court in deciding whether to grant the writ. This is just one of several procedural and substantive infirmities in Petitioners' submission. Additional examples are provided *infra*, any one of which constitutes a basis for denial of review. *See* Sup. Ct. R. 14(4).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Atlantic Richfield hereby identifies all of its parent corporations and any publicly held company that owns 10 percent or more of its stock: (1) BP America, Inc.; and (2) BP p.l.c.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

ARGUMENT 6

I. NO COMPELLING REASON EXISTS TO GRANT CERTIORARI. 6

II. THE NINTH CIRCUIT'S FINDING THAT ATLANTIC RICHFIELD HAD STANDING COMPORTS WITH THIS COURT'S OPINIONS. 7

A. Atlantic Richfield Proved Injury In Fact. 9

B. The Undisputed Evidence Demonstrated That Atlantic Richfield's Injury In Fact Was Caused By Petitioners' Failure To Remediate The Property. 12

C. Injunctive Relief is Likely to Redress the Injuries in Fact Identified by Atlantic Richfield. 13

III. CERTIORARI SHOULD NOT BE GRANTED BASED UPON PETITIONERS' ARGUMENT THAT RCRA MORE READILY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PLAINTIFF THAN TO A DEFENDANT. 15

CONCLUSION 16

APPENDIX 1b

TABLE OF AUTHORITIES

Cases

Allen v. Wright,
468 U.S. 737, 752, 104 S. Ct. 3315, 3325,
82 L. Ed. 2d 556 (1984) 13

Babbitt v. United Farm Workers Nat'l Union,
442 U.S. 289, 298, 99 S. Ct. 2301,
2308-09, 60 L. Ed. 2d 895 (1979) 11

Bennett v. Spear, 520 U.S. 154, 117 S. Ct. 1154,
137 L. Ed. 2d 281 (1997) 8

Bland v. Fessler,
88 F.3d 729, 736 (9th Cir.), *cert. denied*,
519 U.S. 1009, 117 S. Ct. 513,
136 L. Ed. 2d 403 (1996) 11

Brem-Air Disposal v. Cohen,
156 F.3d 1002, 1004 (9th Cir. 1998) 7, 8

Central Arizona Water Conservation Dist. v.
United States Envtl. Protection Agency,
990 F.2d 1531, 1537 (9th Cir.), *cert. denied*,
510 U.S. 828, 114 S. Ct. 94,
126 L. Ed. 2d 61 (1993) 9

Citizens for a Better Environment v. Caterpillar,
30 F. Supp. 2d 1053, 1072 n.5 (C.D. Ill. 1998) 8

Davis v. Sun Oil Co.,
148 F.3d 606, 610-13 (6th Cir.), *cert. denied*,
525 U.S. 1018, 119 S. Ct. 543,
142 L. Ed. 2d 451 (1998) 14

Family & Children's Center, Inc. v. School City of Mishawaka, 13 F.3d 1052, 1058 (7th Cir.), *cert. denied*, 513 U.S. 961, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994) 9

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979) 7

Graham v. Federal Emergency Mgmt. Agency, 149 F.3d 997, 1003 (9th Cir. 1998) 13

Heckler v. Mathews, 465 U.S. 728, 738, 104 S. Ct. 1387, 1394, 79 L. Ed. 2d 646 (1984) 11

Kemper Prime Indus. Partners v. Montgomery Watson Americas, Inc., 2000 U.S. Dist. LEXIS 11450 (N.D. Ill. June 26, 2000) 10, 14

Northeastern Florida Chapter of Assoc. General Contractors of America v. City of Jacksonville, 508 U.S. 656, 663, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (1993) 12, 13

Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 491-92 (9th Cir. 1987) 11

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 1976) 12

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83, 102-04, 118 S. Ct. 1003,
1016-17, 140 L. Ed. 2d 210 (1998) 9

Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197,
45 L. Ed. 2d 343 (1975) 7

Statutes

42 U.S.C. § 6972(a) 6, 7, 8
42 U.S.C. § 6972(a)(1)(B) 3
42 U.S.C. § 6972(e) 15

Rules

Fed. R. Civ. P. 59 ..... 1, 4
Fed. R. Civ. P. 59(e) 4
Sup. Ct. R. 10 ..... 6, 7
Sup. Ct. R. 10(a) 6, 7
Sup. Ct. R. 10(c) 6
Sup. Ct. R. 14(1)(d) 1
Sup. Ct. R. 14(1)(i) 1
Sup. Ct. R. 14(1)(i)(i) 1
Sup. Ct. R. 14(1)(i)(ii) 1
Sup. Ct. R. 14(1)(i)(vi) 1
Sup. Ct. R. 14(4) 1

Miscellaneous

U.S. Const., Art. III 1, 4, 6, 7, 8
15 J. Moore, *Moore's Federal Practice*,
§101.40[5][a] (3d ed. 2002) 9
17 C. Wright, A. Miller & E. Cooper,
Federal Practice & Procedure: Jurisdiction 2d,
§4036 (1988 & supp. 2002) 15

OPINIONS BELOW

Atlantic Richfield objects to Petitioners' incomplete citation of opinions and orders entered in the case by the lower courts. Both the "Opinions Below" section and the Appendix in the Petition for Writ of Certiorari ("Petition") omit the *Order Denying Defendants' Motions Pursuant to Fed. R. Civ. P. 59* ("Order"), entered by the United States District Court for the Central District of California ("District Court") on August 8, 2000. The Order addresses the precise issue as to which Petitioners seek review. It sets forth the District Court's findings and conclusions regarding the existence of Atlantic Richfield's Article III standing to bring the RCRA action, the challenge of which Petitioners did not initiate until *after* the District Court's entry of judgment in favor of Atlantic Richfield.

The Order is set forth in the Appendix to this Opposition at pages 1b through 9b. Pursuant to Sup. Ct. R. 14(1)(d) and 14(1)(i) (specifically, Rules 14(1)(i)(i), 14(1)(i)(ii), and/or 14(1)(i)(vi)), Petitioners were specifically required to cite the Order and to include it in the Appendix to the Petition. Petitioners' failure to do so is, in and of itself, a sufficient reason for the Court to deny the Petition. *See* Sup. Ct. R. 14(4).

The District Court's *Findings of Fact and Conclusions of Law,* entered on May 4, 2000, is set forth at pages 5a-53a of the Appendix to the Petition.[2] The District Court's *Final Judgment and Permanent Injunction*, entered on May 23, 2000, is set forth at pages 56a-61a of the Appendix to the Petition.

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[2] To distinguish between the two appendices, all references to "RA: __" are to the Appendix to the Opposition. All references to "PA: __" are to the Appendix to the Petition.

The *Memorandum Opinion* of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") affirming the District Court's entry of judgment in favor of Atlantic Richfield and against Petitioners, filed on January 16, 2002, is set forth at pages 1a-4a of the Appendix to the Petition. The Ninth Circuit's Order denying Petitioners' petition for rehearing and rehearing en banc, filed on March 12, 2002, is set forth at pages 54a-55a of the Appendix to the Petition.

No prior orders or opinions have been reported.

STATEMENT OF THE CASE

In 1979, two of the petitioners, Jamshid Zaman and Mahvash Zaman, acquired the real property commonly known as 8800 Burton Way in Beverly Hills, California ("Property"). *See* PA: 9a. Following their acquisition of the Property, Jamshid Zaman operated a gasoline service station on the site. *See* PA: 9a-10a. Later, petitioner Behrouz Zaman operated a car repair and mechanic shop on the site. *See* PA: 11a. In recent years, petitioner Affordable Cars, Inc. has operated a car rental business at the Property. *See* PA: 15a.

By the mid-1980s, Petitioners had allowed the Property to become contaminated with thousands of gallons of gasoline and waste oil. *See* PA: 11a-12a. Petitioners did nothing to clean up the Property, allowing the unremediated contamination to begin to migrate off site. *See* PA: 16a-17a, 19a. Instead, Petitioners sought to shift the blame for the contamination to Atlantic Richfield. Petitioners accused Atlantic Richfield, which had owned the Property for a number of years prior to selling it in 1979, of contaminating the Property and demanded that Atlantic Richfield undertake at its own expense the clean-up. *See* PA: 7a, 9a, 15a-17a; RA: 6b.

Upon learning of the existence of the contamination, Atlantic Richfield engaged in extensive good-faith negotiations with Jamshid Zaman and his representatives concerning a potential agreement to remediate the Property. *See* PA: 16a. Atlantic Richfield also took steps to assess the site, as well as to remove the most dangerous contaminants. *See id.* Atlantic Richfield spent in excess of $200,000 in connection with these site assessment and remediation activities, much of which was done in response to agency orders directed to Jamshid Zaman. *See id*

Efforts by Atlantic Richfield over seven years to reach an agreement with Petitioners regarding the clean-up of the Property were unsuccessful, as Petitioners persisted in their refusal to take appropriate steps to remediate the Property. Confronting this intransigence, the threat of agency action directed against Atlantic Richfield, and the possibility of litigation from adjoining landowners, Atlantic Richfield initiated in October 1994 the process (by giving the 90 days' required notice) preparatory to filing a suit for injunctive relief under RCRA.[3] *See* PA: 17a.; RA: 5b-7b.

Following a lengthy trial that began in March 2000, the District Court found Petitioners to be responsible for 100% of the gasoline and waste oil contamination at the Property. *See* PA: 20a-34a. The District Court concluded that the evidence justified the issuance of an injunction pursuant to RCRA to ensure the Property would be remediated. *See* PA: 35a, 40a-

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[3] Under RCRA, "any person may commence a civil action on his own behalf . . . against any person . . . who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

41a. The District Court thereafter on May 23, 2000 entered its *Final Judgment and Permanent Injunction*. *See* PA: 56a. Only at this point did Petitioners raise for the first time the issue of Atlantic Richfield's Article III standing, asserting it as a ground for their motion to vacate the judgment under Fed. R. Civ. P. 59. *See* RA: 4b. The District Court denied the motion, and, in so doing, it augmented its findings, based on the testimony adduced at trial, to address the standing issue. *See* RA: 5b-7b.

The Petition is premised on a persistent and fundamental misstatement of the factual record before the District Court and the Ninth Circuit. Petitioners are flatly wrong in asserting that: (1) the Ninth Circuit "has decided Atlantic Richfield's Article III standing in reliance on evidence not in record"; and (2) "[p]rior to this lawsuit, the Petitioners did not contend that Atlantic Richfield was responsible for the contamination and did not demand that the company help cover remediation costs." Petition at 3-4. In point of fact, Jamshid Zaman's representative Ali Ebrahimi testified at trial through a videotaped deposition that Jamshid Zaman approached Atlantic Richfield in the mid-1980s because he maintained that Atlantic Richfield had caused the contamination and should bear the clean-up costs.[4] *See* PA: 16a-17a.

Furthermore, while Petitioners acknowledge that the District Court denied their motion to vacate the judgment based upon Atlantic Richfield's alleged lack of standing, *see* Petition

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[4] The District Court's Findings of Fact and Conclusions of Law indicated that "[t]he Court received the testimony of Eli [*sic*] Ebrahimi by way of videotaped excerpts of deposition testimony." Appendix to Petition at 6a, 46a n. 3. Excerpts from the transcript of Mr. Ebrahimi's deposition testimony were included as pages 590-600 of the Supplemental Excerpts of Record filed by Atlantic Richfield with the Ninth Circuit.

at 2, they fail to set forth the District Court's findings on the standing issue either in the body of their Petition or in the Appendix thereto. In denying Petitioners' motion to vacate the judgment, the District Court stated that its Findings of Fact "did not expressly address the issue of standing because (1) standing had never been challenged until the filing of the Rule 59(e) motion, and (2) because the record so clearly showed that [Atlantic Richfield] had standing." RA: 5b

In its Findings of Facts and Conclusions of Law and in its Order denying the motion to vacate the judgment, the District Court found that the contamination, unless remediated, would continue to migrate off-site and cause off-site contamination. *See* PA: 19a; RA: 5b-6b. In holding that Atlantic Richfield had standing to pursue its RCRA claim, the District Court found that the contamination implicated Atlantic Richfield as a prior owner of the Property because: (1) "[i]t is possible that owners of adjacent property might sue [Atlantic Richfield] if contamination emanating from the Property contaminated their Property"; (2) "[Petitioners] claimed that [Atlantic Richfield] was responsible for the contamination at the Property and sought to have [Atlantic Richfield] pay for the costs of remediating the Property"; and (3) a public agency, the Regional Water Quality Control Board (the "RWQCB"), was seeking to have the Property remediated and could have issued an enforcement order naming all potentially responsible parties including Atlantic Richfield, but "did not do so, in part, because it believed that [Petitioners] were proceeding with remediation." RA: 5b-6b.

The District Court then found that, if Petitioners had remediated the Property, "[Atlantic Richfield] would not be subject to suit from adjacent neighbors and would not be subject to an RWQCB enforcement action," and "[Atlantic Richfield's] potential liability to [Petitioners] would have been

lower." RA: 6b-7b. Accordingly, the District Court found that: (1) "[r]emediation of the Property decreases the likelihood of lawsuits from adjacent neighbors and decreases [Atlantic Richfield's] financial exposure"; and (2) "[r]emediation of the Property removes the threat of an RWQCB enforcement action." RA: 7b. The District Court therefore concluded that "[Atlantic Richfield] had standing under Article III of the Constitution and under 42 U.S.C. § 6972(a)." RA: 7b.

The Ninth Circuit found that there was a real controversy giving Atlantic Richfield standing to sue because "[Petitioners], through their representative Ebrahimi, contended that Atlantic Richfield was responsible for the contamination and demanded that the company help cover remediation costs." PA: 3a. Having found this to be a sufficient basis to confer Article III standing, the Ninth Circuit did not need to address whether the other two controversies identified by the District Court also constituted injuries in fact giving Atlantic Richfield the requisite standing to sue. *See id.*

ARGUMENT

I. NO COMPELLING REASON EXISTS TO GRANT CERTIORARI.

Under Rule 10 of the Supreme Court Rules, a petition for a writ of certiorari "will be granted only for compelling reasons" in the Court's discretion. Sup. Ct. R. 10. Petitioners cannot show that the Ninth Circuit's unpublished Memorandum Opinion decided an important federal question in a way that conflicts with decisions from this Court or other federal appellate courts. *See* Sup. Ct. R. 10(a), (c). Nor can Petitioners show that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or

sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

At most, Petitioners contend that the District Court and the Ninth Circuit committed a factual error in finding that Atlantic Richfield suffered injury in fact giving it standing to sue. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Neither error, in any event occurred in this case. The application of well-settled constitutional principles to the undisputed evidence compelled the Ninth Circuit to affirm the District Court's finding that Atlantic Richfield possessed the requisite standing to pursue its RCRA claim.

II. THE NINTH CIRCUIT'S FINDING THAT ATLANTIC RICHFIELD HAD STANDING COMPORTS WITH THIS COURT'S OPINIONS.

The determination of whether a plaintiff has standing to bring suit under a statute begins with an examination of the legislative intent. It is axiomatic that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S. Ct. 1601, 1608, 60 L. Ed. 2d 66 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). This is what Congress has done in 42 U.S.C. § 6972(a), the citizen-suit provision of RCRA under which Atlantic Richfield proceeded, which broadly confers standing upon "any person." As one court explained:

> . . . The text [of Section 6972(a)] could not be more clear as to the statute's scope: "any

> person," including [the plaintiff], can sue "any person," including the United States and its officers, for any violation of "any of [RCRA's] . . . requirements." [42 U.S.C. § 6972(a).] In light of the extraordinary breadth of this statutory language, [the plaintiff] most certainly *could have* filed a citizen-suit.
>
> A recent Supreme Court case makes this very point. As the Court explained in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997), with regard to the citizen-suit provision of the Endangered Species Act, a conferral of standing upon "any person" is "an authorization of remarkable breadth." *Id.* at 1162. It applies to "*all* the causes of action" created by the statute, and "there is no textual basis for saying that its expansion of standing requirements applies to environmentalists alone." *Id.* at 1163 (emphasis added). . . .

Brem-Air Disposal v. Cohen, 156 F.3d 1002, 1004 (9th Cir. 1998) (emphasis in original) (footnote omitted). *See Citizens for a Better Environment v. Caterpillar*, 30 F. Supp. 2d 1053, 1072 n.5 (C.D. Ill. 1998) (because RCRA authorizes "any person" to commence a suit, a RCRA plaintiff's standing may not be challenged under the prudential "zone of interest" requirement).

Apparently recognizing this authority, Petitioners do not dispute that RCRA confers standing upon Atlantic Richfield or challenge Atlantic Richfield's standing as a prudential matter. Instead, Petitioners premise their challenge upon the baseline standing requirements imposed by Article III, Section 2 of the United States Constitution. *See* Petition at 6-7.

For purposes of Article III standing, three requirements must be met: (1) "there must be alleged (and ultimately proven) an 'injury in fact' – a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical"'"; (2) "there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3) "there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04, 118 S. Ct. 1003, 1016-17, 140 L. Ed. 2d 210 (1998) (citation omitted).

A. Atlantic Richfield Proved Injury In Fact.

Atlantic Richfield brought suit to protect its own financial interest in ensuring that the Property was remediated as expeditiously as possible. "Pecuniary injury is clearly 'a sufficient basis for standing.'" *Central Arizona Water Conservation Dist. v. United States Envtl. Protection Agency*, 990 F.2d 1531, 1537 (9th Cir.) (citation omitted), *cert. denied*, 510 U.S. 828, 114 S. Ct. 94, 126 L. Ed. 2d 61 (1993). *See generally* 15 J. Moore, *Moore's Federal Practice*, § 101.40[5][a] (3d ed. 2002) ("[p]ecuniary interest clearly provides a sufficient basis for standing") (footnote omitted). Furthermore, where the plaintiff has Aan actual stake in the outcome that goes beyond 'intellectual or academic curiosity,' . . . even a minor or non-economic injury will satisfy the strictures of Article III." *Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1058 (7th Cir.) (citation omitted), *cert. denied*, 513 U.S. 961, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994).

The evidence introduced at trial showed that the standing requirements were met for at least three different injuries suffered by Atlantic Richfield. Each of these injuries

resulted directly from Petitioners' continuing failure to remediate the Property. Any one of these three injuries, taken alone, would be sufficient to create Article III standing.

First, Atlantic Richfield had standing because Petitioners claimed that Atlantic Richfield was responsible for the contamination, and Petitioners' continued failure to commence remediation was increasing the amount of damages that might have been assessed against Atlantic Richfield. Second, Atlantic Richfield had standing because the contamination at the Property, unless remediated, would continue to migrate off-site, creating the potential that nearby property owners would sue Atlantic Richfield for contamination of their property. Third, Atlantic Richfield had standing because the RWQCB would, as a matter of policy, have issued an order requiring Atlantic Richfield to clean up the Property if it were not otherwise remediated.

Threat of Suit by Petitioners. As both the District Court and the Ninth Circuit held, Petitioners' own claims that Atlantic Richfield was responsible for the contamination at the Property constituted an injury in fact giving Atlantic Richfield standing. This contention gave Atlantic Richfield a strong pecuniary interest in ensuring that the contamination was remediated as expeditiously and inexpensively as possible. *See Kemper Prime Indus. Partners v. Montgomery Watson Americas, Inc.*, 2000 U.S. Dist. LEXIS 11450 at *2, 6, 18 (N.D. Ill. June 26, 2000) (holding that a defendant alleged to have financial responsibility for contamination at a property had suffered an injury in fact that was "concrete and particularized and actual or imminent" and therefore supported a RCRA claim).

Threat of Suit by Adjacent Landowners. Atlantic Richfield also established injury in fact through evidence

demonstrating a likelihood that the owners of down-gradient property might sue Atlantic Richfield if their property were contaminated by gasoline or waste oil emanating from the Property. Ralph Moran of Atlantic Richfield testified to the existence and significance of this likelihood. Indeed, counsel for Atlantic Richfield received a letter dated September 15, 1997 from counsel for the owner of the land directly to the south of the Property, who threatened to sue Atlantic Richfield if any contamination from the Property migrated to its parcel.[5]

The fact that no adjacent landowner has yet sued Atlantic Richfield does not mean there was no injury in fact. "Injury sufficient to meet the standing requirement may be actual or threatened, . . . and may involve a contingent risk of injury." *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491-92 (9th Cir. 1987) (citing *Heckler v. Mathews*, 465 U.S. 728, 738, 104 S. Ct. 1387, 1394, 79 L. Ed. 2d 646 (1984)). "'[O]ne does not have to await the consummation of threatened injury to obtain preventive relief'"; "'[i]f the injury is certainly impending that is enough.'" *Bland v. Fessler*, 88 F.3d 729, 736 (9th Cir.) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308-09, 60 L. Ed. 2d 895 (1979)), *cert. denied*, 519 U.S. 1009, 117 S. Ct. 513, 136 L. Ed. 2d 403 (1996).

Threat of Agency Enforcement Action. Atlantic Richfield suffered an injury in fact as a result of the actions of the RWQCB. As the District Court found: (1) the RWQCB was seeking to have the Property remediated; (2) "[t]he RWQCB could have issued an enforcement order requiring remediation

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[5] Mr. Moran's testimony and the letter from counsel may be found at pages 690-91 and page 686, respectively, of the Supplemental Excerpts of Record filed with the Ninth Circuit by Atlantic Richfield.

but did not do so, in part, because it believed that [Petitioners] were proceeding with remediation"; and (3) "[t]he enforcement order would have named all potentially responsible parties including [Atlantic Richfield]." RA: 6b. This finding was supported by the testimony of former RWQCB official James Ross that the RWQCB would, as a matter of "standard operating procedure," have named all potentially responsible parties – including Atlantic Richfield – in an enforcement order.[6]

B. The Undisputed Evidence Demonstrated That Atlantic Richfield's Injury In Fact Was Caused By Petitioners' Failure To Remediate The Property.

The requirement of "a causal relationship between the injury and the challenged conduct" means "that the injury 'fairly can be traced to the challenged action of the defendant,' and has not resulted 'from the independent action of some third party not before the court.'" *Northeastern Florida Chapter of Assoc. General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (1993) (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976)).

The causation prong of the standing test is met in this case. Atlantic Richfield's RCRA claim was based upon Petitioners' continuing failure to undertake the remedial efforts necessary to abate the imminent and substantial threat to health or the environment caused by the contamination at the

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[6] Mr. Ross' testimony may be found at pages 750-51 of the Supplemental Excerpts of Record filed with the Ninth Circuit by Atlantic Richfield.

Property. Petitioners' failure to remediate the Property directly caused each of the three injuries in fact identified by Atlantic Richfield. As the District Court found, if Petitioners had remediated the Property as appropriate: (1) it would have "decrease[d] the likelihood of lawsuits from adjacent neighbors and decrease[d] [Atlantic Richfield's] financial exposure"; (2) "Atlantic Richfield's potential liability to [Petitioners] would have been lower"; and (3) it would have "remove[d] the threat of an RWQCB enforcement action." RA: 6b-7b.

C. Injunctive Relief is Likely to Redress the Injuries in Fact Identified by Atlantic Richfield.

The requirement of "a likelihood that the injury will be redressed by a favorable decision" means "that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" *Northeastern Florida Chapter of Assoc. General Contractors of America*, 508 U.S. at 663-64, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (quoting *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 3325, 82 L. Ed. 2d 556 (1984)). "[P]laintiffs 'must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision *will inevitably* redress [their injuries].'" *Graham v. Federal Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998) (citation omitted).

As the District Court found, *see* RA: 6b-7b, the injunctive relief it ordered does much to redress the injuries in fact identified by Atlantic Richfield. Requiring Petitioners to take the steps necessary to prevent any imminent or substantial threat to health or the environment will make it considerably less likely that other property owners will sue Atlantic Richfield for contamination of their property. *See id.* In the event that the District Court had found that Atlantic Richfield

was responsible for any contamination at the Property – which it ultimately did not – the injunctive relief sought by Atlantic Richfield would have decreased the cost of remediation and thereby would have decreased the amount of damages that could be imposed on Atlantic Richfield. *See* RA: 7b. *See also Kemper Prime Indus. Partners*, 2000 U.S. Dist. LEXIS 11450 at *2, 6, 18 (holding that a defendant alleged to have financial responsibility for contamination at a property had shown redressability with regard to its RCRA claim by asserting that its "exposure for the clean-up will be greatly reduced, if not eliminated," if the court ordered remediation of the property). Similarly, the injunctive relief ordered by the District Court made it unnecessary for the RWQCB to issue an enforcement order requiring Atlantic Richfield to remediate the Property. *See* RA: 6b-7b.

In *Davis v. Sun Oil Co.*, 148 F.3d 606, 610-13 (6th Cir.), *cert. denied*, 525 U.S. 1018, 119 S. Ct. 543, 142 L. Ed. 2d 451 (1998), defendants argued that res judicata barred plaintiffs from pursuing a federal claim for injunctive relief under RCRA because they had already obtained injunctive relief in a state court action. *See id.* The Sixth Circuit noted that "[i]t would be possible to reformulate [the defendant's] theory as a challenge to the [plaintiffs'] standing to bring their RCRA action – specifically, as an assertion that the [plaintiffs] fail to meet the 'remedial benefit' requirement of standing." *Id.* at 610 n.4. The Sixth Circuit found that defendants could not have prevailed on such a theory "because the [plaintiffs] may benefit from the pressure placed on [the defendant] to remedy the pollution by the daily-accruing penalties." *Id.* The likelihood that Atlantic Richfield would benefit from an injunction entered by the district court is considerably greater than the likelihood that the *Davis* plaintiffs would have benefitted from the relief sought in the federal lawsuit.

III. CERTIORARI SHOULD NOT BE GRANTED BASED UPON PETITIONERS' ARGUMENT THAT RCRA MORE READILY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PLAINTIFF THAN TO A DEFENDANT.

Without including the issue as a question presented for review, Petitioners suggest that certiorari should be granted because a RCRA plaintiff may more readily recover attorneys' fees than a RCRA defendant, thereby giving a party an incentive to initiate a RCRA suit. *See* Petition at 13-15. However, Petitioners did not raise this issue before the Ninth Circuit. Accordingly, the Court should decline to consider the issue for the first time through a writ of certiorari. *See generally* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction 2d*, § 4036, at 35 & nn. 67-68 (1988 & supp. 2002) (noting "the general rule that new questions may not be raised for the first time on Supreme Court review").

In any event, Petitioners' argument fails on the merits. RCRA authorizes a court "to award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6972(e). If a defendant in a RCRA lawsuit believes that a plaintiff or other party is responsible for the contamination at a site, the defendant may file a RCRA counterclaim, cross-claim, etc. against the culpable party.[7] Should the defendant prevail on its RCRA claim by proving that another party is responsible for the contamination, it will have the benefit of RCRA's more

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[7] Indeed, Petitioners filed an amended counterclaim asserting a RCRA claim against Atlantic Richfield, but the District Court ultimately dismissed the RCRA claim as barred by the statute of limitations.

lenient standard for recovering attorneys' fees even though it asserted its RCRA claim in a capacity other than as plaintiff. The RCRA attorneys' fee provision gives no advantage to the first to bring suit. The same standard applies to whomever is successful in obtaining relief against a party responsible for creating the risk sought to be remedied by the statute.

CONCLUSION

For the reasons stated herein, Atlantic Richfield respectfully asks the Court to deny the Petition.

DATED: August 19, 2002

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-95-566-ABC (AJWx)

[Filed August 4, 2002]
[Entered August 8, 2002]

Atlantic Richfield Company,	)
	)
Plaintiff,	)
	)
v.	)
	)
Jamshid Zaman, et al.,	)
	)
Defendants.	)
	)
	)
And Related Cross-Actions.	)
	)

ORDER DENYING DEFENDANTS' MOTIONS PURSUANT TO FED. R. CIV. P. 59

After reviewing the materials submitted by the parties and the case file, the Court DENIES Defendants' Motions Under Fed. R. Civ. P. 59(b) and 59(e).

Order Denying Defendants' Motions
Pursuant to Fed. R. Civ. P. 59

I. Procedural Background

This matter was tried to the Court March 7 through April 19, 2000. The court issued Findings of Fact and Conclusions of Law on May 3, 2000. The court filed a Final Judgment and Permanent Injunction on May 22, 2000.

Defendants Jamshid Zaman, Mahvash Zaman, Behrouz Zaman, and Affordable Cars, Inc. (the "Zaman Parties") filed the instant motions on June 7, 2000. The first motion is a motion to vacate, alter, or amend the judgment pursuant to Fed. R. Civ. P. 59(e). The Zaman Parties' Rule 59(e) motion is based on the grounds that (1) the Court lacks subject matter jurisdiction and (2) there was insubstantial evidence to hold the separate Zaman Parties liable. The second motion is a motion for new trial pursuant to Rule 59(b). The Rule 59(b) motion is based on the grounds that (1) the Court erred in its evidentiary ruling concerning the belated discovery of the 55-gallon drum and (2) there was a lack of substantial evidence. Plaintiff Atlantic Richfield Company ("ARCO") and Counter-Defendants Lawrence and Margaret Ansley oppose.

II. Discussion

A. Rule 59 Standard

A motion under 59(e) "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange Street Partners v. Arnold*, 179 F. 3d 656,

665 (9th Cir. 1999). "Reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *McDowell v. Calderon*, 197 F. 3d 1253, 1255 n. 1 (9th Cir. 1999) (quoting 11 Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 2810.1 (1995)).

Pursuant to Rule 59(b), a district court may grant a new trial upon a timely motion. General grounds for a new trial include: (1) that the verdict is against the weight of the evidence, (2) that the damages are excessive, or (3) that the trial was unfair, either in light of the substantial errors in the admission or exclusion of evidence, or erroneous instruction of the jury. *See* 11 Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 2805 *et. seq.* (1995). When evaluating a motion for a new trial based on error, the Court's inquiry is twofold: (1) whether an error was in fact committed and (2) whether that error was so prejudicial that denial of a new trial would be "inconsistent with substantial justice." Fed R. Civ. P. 61. Thus, before granting a new trial, the district court must be convinced that the error adversely affected or tainted the verdict.

The burden of proof on a new trial motion rests on the moving party. *Anglo-American Gen. Agents v. Jackson Nat. Life Ins. Co,*. 83 F.R.D. 41, 43 (N.D. Cal. 1979). A motion under Rule 59 is committed to the district court's sound discretion. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980); *389 Orange Street Partners*, 179 F. 3d at 665; *Metromedia Co. v. Fugazy*, 983 F. 2d 350 (2d Cir. 1992).

Finally, a Rule 59 motion "may not be used. . . to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F. 3d 396, 403 (4th Cir. 1998) (describing Rule 59(e) standard); accord *389 Orange Street Partners*, 179 F. 3d at 665; 11 Wright, *supra*, § 2805 (describing Rule 59(b) standard).

B. The Court has jurisdiction.

For the first time in this litigation, the Zaman Parties argue that this Court has no subject-matter jurisdiction over this case. Specifically, they argue that ARCO has no standing to sue as required by Article III of the United States Constitution.

Although the Zaman Parties bring up this argument for the first time after trial, the prohibition against raising arguments for the first time does not generally apply to jurisdictional questions because subject matter jurisdiction goes to the heart of whether this Court has power to issue a judgment in the first place. If the Court has no subject matter jurisdiction, any judgment issued by the Court would be void.

Of course, where there is an honest concern about jurisdiction, it is incumbent on the party to challenge that jurisdiction as early as possible. As the parties are aware, this case, which spanned five years, placed a substantial burden on the resources of this Court and of the parties. But even if the Court were to assume that Zaman Parties had permitted the

Court to waste its resources on a matter that they suspected all along was not properly before this Court, the Court would have to vacate the judgment if it determined that subject matter jurisdiction was lacking.[1]

The Court, however, finds that the Zaman Parties' contention lacks merit. The Court's finding that it had subject matter jurisdiction, (Conclusions of Law ¶ 1), is fully supported by the record. The Zaman Parties argue that because the Court did not make express findings of fact and conclusions of law about ARCO's standing that the judgment must be vacated. In all honesty, the Court did not expressly address the issue of standing, because (1) standing had never been challenged until the filing of the Rule 59(e) motion, and (2) because the record so clearly showed that ARCO had standing. To clarify any doubts, the Court makes the following additional findings:

1. ARCO is a person for purposes of 42 U.S.C. § 6972 of the Resource Conservation and Recovery Act ("RCRA").

2. The gasoline and waste oil contamination on the Property is a continuing threat to human health and the environment. The unremediated contamination has moved off-site and will continue to move off-site unless action is

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[1] At the same time, if it was just a matter of a trial record that lacked evidence to support the issue of standing, the Court would first grant Plaintiff the opportunity to meet its burden of showing that it had standing.

taken. If the Property is not remediated, the groundwater will continually be recontaminated with seasonal cyclic rise and fall of the water table. (Findings of Fact ¶ 56.)

3. It is possible that owners of adjacent property might sue ARCO if contamination emanating from the Property contaminated their property. (Moran Testimony.)

4. The Zaman Parties claimed that ARCO was responsible for the contamination at the property and sought to have ARCO pay for the costs of remediating the Property.

5. The Regional Water Quality Control Board ("RWQCB") was seeking to have the water remediated. (Ross Testimony.)

6. The RWQCB could have issued an enforcement order requiring remediation but did not do so, in part, because it believed that the Zaman Parties were proceeding with remediation. (Ross Testimony; Findings of Fact ¶ 57.)

7. The enforcement order would have named all potentially responsible parties including ARCO. (Ross Testimony.)

8. If the Zaman Parties had remediated the Property, ARCO would not be subject to suit

from adjacent neighbors and would not be subject to an RWQCB enforcement action.

9. If the Zaman Parties had remediated the Property, ARCO's potential liability to the Zaman Parties would have been lower.

10. Remediation of the Property decreases the likelihood of lawsuits from adjacent neighbors, and decreases ARCO's financial exposure.

11. Remediation of the Property removes the threat of an RWQCB enforcement action.

Based on these findings, the Court finds that ARCO had standing under Article III of the Constitution and under 42 U.S.C. § 6972(a).

C. There is sufficient evidence to support the judgment.

Both of the Zaman Parties' motions argue that there is insufficient evidence to hold Behrouz Zaman on the gasoline contamination, Jamshid Zaman on the waste oil contamination, Mahvash Zaman on any contamination, and Affordable Cars on any contamination. The Court disagrees. The Court finds that there is sufficient evidence to support judgment against each of the Zaman Parties.

The Court also notes that for the first time in their reply on the Rule 59(e) motion, the Zaman parties argue that the Court should apportion the amount of contamination

among each of the Zaman Parties. The Zaman Parties could have brought this argument at trial or earlier. Accordingly, the Court refuses to consider the argument. *See 389 Orange Street Partners*, 179 F. 3d. at 665. The Court's holding that the Zaman Parties are jointly and severally liable for the full amount of the contamination on the site stands.

D. The Court did not err in sanctioning the Zaman Parties for spoliation of evidence.

Finally, the Zaman Parties argue that the Court erred in sanctioning them for their handling of the 55-gallon drum that they discovered during the pendency of this litigation. The Court finds that no error was committed. Furthermore, the Court makes the following observations:

1. There was no procedural impediment preventing Plaintiff from making its motion when it did. Moreover, the Zaman Parties challenged the "timeliness" of the motion when it was first made and the Court found that the spoliation motion was proper.

2. The Court's ruling and sanction was limited and targeted at the specific violation at issue. Moreover, even without the presumption,[2] the

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[2] The Court notes that the sanction consisted solely of a "rebuttable presumption that the sampling, had it been done by Arco's expert, would have been positive for Arco and would have been detrimental to the Zamans." (RT 1414-15.)

Court would have reached the same conclusion. (*See* Findings of Fact ¶ 97.)

III. Conclusion

For the foregoing reasons, the Court DENIES the Zaman Parties' Rule 59 motions.

SO ORDERED,

DATED: August 4, 2000

/s/_____
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 30 2002
OFFICE OF THE CLERK

(3)

No. 02-93

In the

Supreme Court of the United States

JAMSHID ZAMAN, an individual; MAHVASH ZAMAN, an individual; BEHROUZ ZAMAN, an individual; ZAMAN INC., a California Corporation dba Beverly Hills Motorworks; AFFORDABLE CARS INC., a California Corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,

and

FOX & FIELDS, a general partnership; ROBERT J. FOX; JERRY FIELDS; LAWRENCE R. ANSLEY, SR.; MARGARET ANSLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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23pp

TABLE OF CONTENTS

I. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING 1

II. ARCO HAS FAILED TO DEFEND THE COURT OF APPEALS' BASIS FOR THE COURT'S JURISDICTION 2

1. None of the Future Injuries Asserted by ARCO Involve "An Invasion of a Legally-protected Interest" 3

2. None of the Future Injuries Asserted by ARCO Were Imminent 3

3. A Threat or Fear of a Lawsuit or an Enforcement Action Does Not Satisfy Article III Requirements 4

4. ARCO's Asserted Injuries Are Not Real since They Were Not Alleged in the Pleadings 5

5. There Is No Causal Relationship Between the Asserted Injuries and the Challenged Conduct 5

6. The Injunctive Relief Sought by ARCO Would Not Redress the Asserted Injuries 6

III. PETITIONERS HAVE COMPLIED WITH ALL THE APPLICABLE REQUIREMENTS OF RULE 14 7

IV. PETITIONERS' ARGUMENT THAT RCRA MORE READILY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PLAINTIFF THAN A DEFENDANT IS NOT A NEW ISSUE, BUT RATHER A NEW ARGUMENT IN SUPPORT OF PETITIONERS' CONTENTION THAT ARCO LACKS ARTICLE III STANDING 8

V. ARCO HAS FAILED TO PROVIDE EVIDENCE IN THE RECORD IN SUPPORT OF THE COURT OF APPEALS' DECISION ON STANDING 9

CONCLUSION 10

APPENDIX

TRANSCRIPT EXCERPTS OF SUPPLEMENTAL HEARING 1a

TABLE OF AUTHORITIES

FEDERAL CASES

ADULT VIDEO ASS'N v UNITED STATES DEP'T OF JUSTICE, 71 F. 3D 563, 565-67 (6TH CIR. 1995) 4

ARIZONANS FOR OFFICIAL ENGLISH v. ARIZONA, 520 U.S. 43, 64, 117 S.C. 1055, 1067 (1997) 7

LEBRON v NATIONAL RAILROAD PASSENGERS CORP., 513 U.S. 374, 379 (1995) 9

LUJAN v DEFENDERS OF WILDLIFE, 504 U.S. 555, 559-560, 112 S.CT. 2130, 2136 (1992) 3

NATIONAL RIFLE ASSOCIATION v MAGAW, 132 F. 3D 272 (6TH CIR. 1997) 4

NORTHEASTERN FLORIDA CHAPTER OF ASSOC. GENERAL CONTRACTORS OF AMERICA v CITY OF JACKSONVILLE, 508 U.S. 656, 663 (1993) 6, 7

PGA TOUR, INC. v MARTIN, *532 U.S. 661*, 121 S.CT. 1879, 1891 N.27 (2001) 9

STEEL CO. v. CITIZENS FOR A BETTER ENVIRONMENT, 523 U.S. 83, 103, 118 S.C. 1003, 1016 (1998) 5, 7

STOIANOFF v MONTANA, 695 F. 2D 1214, 1223 (9TH CIR. 1983) 4

VALLEY FORGE CHRISTIAN COLLEGE v AMERICANS UNITED FOR SEPARATION

OF CHURCH AND STATE, 454 U. S. 464, 473, 102 S. CT. 752 (1982) 3

WHITMORE V ARKANSAS, 495 U.S. 149, 155, 110 S.CT. 1717, 1724-1725 (1990) 3

I. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING

ARCO does not (and could not) dispute that the Petition presents issues of enormous constitutional and practical importance. The Court of Appeals' decision on ARCO's standing, if upheld, would practically abolish the case-or-controversy requirements of the Constitution. ARCO has failed to counter Petitioners' argument that the Court of Appeals' decision would in effect allow all potential defendants to make a federal case out of ordinary state claims of nuisance and trespass. According to the Court of Appeals' decision, defendants in state courts can easily remove ordinary state tort actions to federal court by the mere fact that plaintiff has sued and alleged that defendant was responsible for the contamination. The Court of Appeals' decision encourages all potential state defendants to take the initiative and file a citizen suit in federal court and take advantage of the RCRA's fee provision which is more readily available to plaintiffs than to defendants and not available in state courts. The impact of the Court of Appeals' decision is very far reaching. It would apply to all citizen suit statutes passed by Congress, such as RCRA, the Civil Rights Act, etc.

In its brief in opposition, ARCO concedes that its sole purpose for filing this RCRA lawsuit was to use the federal court as a vehicle to take preventive measures against becoming a defendant in the state court. ARCO also admits that RCRA more readily authorizes an award of attorneys' fees to a plaintiff than a defendant and that California law does not provide for attorneys' fees for state tort actions. While it may have made good strategic sense for ARCO to have taken the initiative to become a Plaintiff in the federal court with the right to recover its attorneys' fees if it wins without the risk of paying the other party's attorneys' fees if it loses, as opposed to potentially becoming a defendant in the state court without the right to attorneys' fees, such strategy does not satisfy the "rigorous" requirements of standing enunciated by this court and does not comport with the legislative intent of the fee provision of RCRA.

ARCO has failed to seriously dispute all of the essential reasons why review should be granted: This court has consistently held that the case-or-controversy requirements of Article III of the Constitution is a critically important jurisdictional limitation of federal courts. These requirements are "rigorous" and the issue of federal court's jurisdiction is of the utmost importance. As stated in the Petition, the Court of Appeals has decided this extremely important federal question in a way that conflicts with the precedents set by this court. Although, ARCO attempts to defeat review by downplaying the rigorous requirements of Article III standing enunciated by this court and the Court of Appeals' failure to follow this court's precedents in that regard, or by mischaracterizing the constitutional issue presented as erroneous factual findings or the misapplication of properly stated rule of law, or by asserting that Petitioners' argument regarding RCRA fee provision should be ignored by this court, or that Petitioners have violated Rule 14 of this court, its arguments are unconvincing. Further review is plainly warranted.

II. ARCO HAS FAILED TO DEFEND THE COURT OF APPEALS' BASIS FOR THE COURT'S JURISDICTION

ARCO has failed to discuss and defend the Court of Appeals' justification for finding that ARCO has article III standing. Instead, in a shot gun approach, ARCO has submitted for this court's consideration three hypothetical injuries: (1) threat of suit by petitioners; (2) threat of suit by adjacent landowners; (3) threat of agency enforcement action. Realizing that the Court of Appeals' basis for ARCO's standing does not comport with this court's precedents, ARCO has added two additional hypothetical injuries (which were raised and argued and were rejected by the Court of Appeals) in the hope that one of the asserted injuries would be accepted.

ARCO concedes that it has not suffered any actual injuries. However, ARCO contends that even though it did not suffer any actual injuries, it could have suffered future

injuries. As discussed below in more detail, all three injuries asserted by ARCO are hypothetical injuries which do not satisfy the rigorous requirements set by this court.

1. None of the Future Injuries Asserted by ARCO Involve "An Invasion of a Legally-protected Interest"

This court has held that plaintiff's "injury in fact" must involve an "invasion of a legally-protected interest." *Lujan v Defenders of Wildlife*, 504 U.S. 555, 559-560, 112 S.Ct. 2130, 2136 (1992). ARCO has not (and could not) cite any authority in support of a notion that freedom from worries or concerns about lawsuits or governmental action is a legally-protected interest. For this simple reason, ARCO lacks Article III standing. In fact, this court has held that where a plaintiff cannot establish that it has suffered an injury in fact for which it may seek legal redress, rather than being a concerned bystander to someone else's injury, it has no right to invoke the jurisdiction of the federal court. *Valley Forge Christian College v Americans United for Separation of Church and State*, 454 U. S. 464, 473, 102 S. Ct. 752 (1982). Considering all the injuries asserted by ARCO in its opposition, at best, ARCO is merely a concerned bystander to someone else's injury and, therefore, has no right to invoke the jurisdiction of the federal court.

2. None of the Future Injuries Asserted by ARCO Were Imminent

This court has also held that plaintiff's "injury in fact"must be (a) concrete and particularized, and (b) "actual or **imminent**," not "conjectural" or "hypothetical." *Lujan v Defenders of Wildlife*, 504 U.S. 555, 559-560, 112 S.Ct. 2130, 2136 (1992); *Whitmore v Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1724-1725 (1990) (Emphasis added). In the present case, ARCO has failed to show that any of the asserted future injuries were imminent. There is no findings of fact by the District Court or the Court of Appeals that a lawsuit by petitioners or a lawsuit by adjacent landowners or

an agency enforcement action were imminent. ARCO has not even discussed this important criteria in its Opposition Brief. Since ARCO has not been able to show that the asserted future injuries were imminent, ARCO lacks Article III standing.

3. A Threat or Fear of a Lawsuit or an Enforcement Action Does Not Satisfy Article III Requirements

A threat or fear of a lawsuit or a government enforcement action does not satisfy the standing requirements of the United States Constitution. "It has been established...that fear of possible future application of a federal criminal statute does not confer standing in a declaratory judgment action." *Adult Video Ass'n v United States Dep't of Justice*, 71 F. 3d 563, 565-67 (6th Cir. 1995). "The mere existence of a statute, which may nor may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Stoianoff v Montana*, 695 F. 2d 1214, 1223 (9th Cir. 1983).

In *National Rifle Association v Magaw*, 132 F. 3d 272 (6th Cir. 1997), several plaintiffs claimed they were inhibited from possessing firearms because they feared prosecution. The court held: "The mere 'possibility of criminal sanctions applying does not in and of itself create a case or controversy.' (Citations). The individual plaintiffs have failed to show the high degree of immediacy necessary for standing when fear of prosecution is the only harm alleged. (Citation)." *Id.* at 293. The court further noted that some of the plaintiffs had submitted hypothetical questions to the ATF and were advised that the hypothetical activity would subject them to federal prosecution. The court held that this threat of prosecution was still too speculative to confer standing. *Id.* at 293-94.

Similarly, in this case, the mere possibility of a civil lawsuit or an enforcement action by a public agency does not in and of itself create a case or controversy. ARCO has failed to show the high degree of immediacy necessary for standing since the threat of lawsuit or an enforcement action is the

only harm asserted.

4. *ARCO's Asserted Injuries Are Not Real since They Were Not Alleged in the Pleadings*

Although ARCO contends that it has suffered three specific injuries, it has failed to explain and respond to the Zaman Parties' contention that ARCO did not mention any of the three asserted injuries in the First Amended Complaint or in the First Amended Pre-Trial Conference Order. This court has held that "[f]irst and foremost, there **must be alleged (and ultimately proven)** an 'injury in fact'..." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103, 118 S.C. 1003, 1016 (1998) (Emphasis added). ARCO has never sought to amend the pleadings to include the three alleged injuries. In fact, paragraph 33 of ARCO's First Amended Complaint states as follows:

> Atlantic Richfield is not aware of any action taken on behalf of the United States, any federal agency, the State of California, or any State agency to commence and diligently prosecute an action to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment.

As it can be seen, one of ARCO's injuries that is asserted now was affirmatively denied by ARCO itself at the time of the filing of this lawsuit. As such, ARCO cannot claim that it was concerned about the possibility of an enforcement action. ARCO should not be allowed to conjure up hypothetical injuries post-trial in order to confer Article III standing.

5. *There Is No Causal Relationship Between the Asserted Injuries and the Challenged Conduct*

ARCO has failed to discuss and explain the causal relationship between the injury found by the Court of

Appeals (Petitioners' contention of ARCO's liability) and the challenged conduct. In that regard, ARCO has merely stated that "Petitioners' continued failure to commence remediation was increasing the amount of damages that might have been assessed against Atlantic Richfield." (Opposition Brief, Page 10). However, there is no finding of fact by either the Court of Appeals or the District Court that ARCO's potential amount of damages were increasing. Furthermore, There is no finding by the lower courts that it would have cost more to defend a potential lawsuit by the Zaman Parties, the adjacent landowners or the government than to file a RCRA lawsuit. ARCO admits that it had spent in excess of $200,000 in connection with site assessment and removal of the most dangerous contaminants. (Opposition Brief, page 3). However, there is no finding by the lower courts that it would have cost more for ARCO to complete the cleanup of the property than to litigate the present action for eight years all the way to this court just to obtain an injunction against Mr. Zaman to cleanup his own property. Finally, if ARCO believed that it was not responsible for the contamination, it should not have been worried about the cleanup cost.

This court has held that the requirement of "a causal relationship between the injury and the challenged conduct" means "that the injury 'fairly can be traced to the challenged action of the defendant,' and has not resulted 'from the independent action of some third party not before the court.'" *Northeastern Florida Chapter of Assoc. General Contractors of America v City of Jacksonville*, 508 U.S. 656, 663 (1993). In the present case, ARCO's hypothetical injury of a likelihood of a lawsuit by adjacent land owners and an enforcement action would actually result from the independent action of some third party not before the court, i.e., the neighboring property owners and RWQCB, not from the challenged actions of the Zaman Parties.

6. The Injunctive Relief Sought by ARCO Would Not Redress the Asserted Injuries

ARCO has failed to discuss and explain as to how an injunctive relief against Mr. Zaman would redress ARCO's

injury found by the Court of Appeals (Petitioners' contention of ARCO's liability). This court has held that "a likelihood that the injury will be redressed by a favorable decision" means "that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not '**too speculative**.'" *Northeastern Florida Chapter of Assoc. General Contractors of America, supra*, 508 U.S. at 663-64 (Emphasis added). As such, it would be pure speculation to assert that an injunction against Mr. Zaman to clean up his own Property would enjoin him from filing a lawsuit against ARCO. To the contrary, filing a RCRA action against Mr. Zaman forced him to file a counter-claim whereas he may not have filed any such action had he not been sued by ARCO in the first place. Similarly, it would be pure speculation to assert that an injunction against the Zaman Parties would enjoin the neighboring property owners from filing a lawsuit against ARCO or would enjoin RWQCB from issuing any enforcement orders against ARCO. Since the neighboring property owners and RWQCB are not parties to this action, this court would have no jurisdiction over them and could not possibly enjoin them from conducting any of their activities.

ARCO has argued, and the District Court has made a finding, that unless remediated, the contamination at the property is likely to continue to migrate to adjacent properties, and will continue to pose an imminent or substantial threat to health or the environment. However, an interest shared generally with the public at large in proper application of the Constitution and laws is not sufficient. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.C. 1055, 1067 (1997).

It is not enough that a favorable judgment will benefit the public at large or punish a wrongdoer or simply make plaintiff happy. Psychic satisfaction is not enough for Article III standing. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107, 118 S.C. 1003, 1019 (1998).

III. PETITIONERS HAVE COMPLIED WITH ALL THE APPLICABLE REQUIREMENTS OF RULE 14.

ARCO's contention that Petitioners have failed to comply with the applicable requirements of Rule 14 has no merit. ARCO specifically contends that this Petition should be denied because Petitioners have allegedly failed to comply with Rule 14(4) of this court. Rule 14(4) of this court provides as follows:

> The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

ARCO has failed to show that this Petition has not been presented with accuracy, brevity and clarity. ARCO's contention that the Petitioners were required to attach the District Court's order denying defendants' motion to vacate the judgment has no merit. Petitioners have properly attached Circuit Court Opinion, the District Court Opinion, Order Denying Petition for Rehearing, and the District Court Judgment, as required by Rule 14. Petitioners have not sought the review of the District Court's order denying defendants' motion to vacate the judgment. As such, there was no need to attach the order as an appendix. Petitioners have cited to this order in the Procedural History of the Petition, Page 2.

IV. PETITIONERS' ARGUMENT THAT RCRA MORE READILY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PLAINTIFF THAN A DEFENDANT IS NOT A NEW ISSUE, BUT RATHER A NEW ARGUMENT IN SUPPORT OF PETITIONERS' CONTENTION THAT ARCO LACKS ARTICLE III STANDING

ARCO concedes that RCRA more readily authorizes an award of attorneys' fees to a plaintiff than to a defendant,

thereby giving ARCO an incentive to initiate this RCRA suit. However, ARCO contends that this is a new issue that is raised for the first time on review and, therefore, should not be considered by this court. ARCO's contention has no merit since this is not a new claim, but rather a new argument in support of Petitioners' claim that ARCO lacks Article III standing. This court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' (Citation.)" *Lebron v National Railroad Passengers Corp.*, 513 U.S. 374, 379 (1995). *See also PGA Tour, Inc. v Martin*, 121 S.Ct. 1879, 1891 n.27 (2001) (where Americans with Disabilities Act coverage issue was raised below, Court would entertain new argument regarding the statute's scope).

ARCO's argument that a RCRA defendant is not at a disadvantage because said defendant may be able to file a RCRA counterclaim or cross-claim and receive attorneys' fees as a counter-claimant or a cross-claimant has no merit. This argument suggests that the standards set by this court can be reversed by defendants simply filing a counterclaim or cross-claim. Additionally, ARCO has failed to counter the argument that a RCRA Plaintiff is in a much more advantageous position than a state court defendant since a RCRA Plaintiff is entitled to its attorneys' fees without any risk while a state defendant is not.

V. ARCO HAS FAILED TO PROVIDE EVIDENCE IN THE RECORD IN SUPPORT OF THE COURT OF APPEALS' DECISION ON STANDING

ARCO has failed to provide this court with any evidence admitted in the record in support of the Court of Appeals' finding that "[t]he Zaman Parties, through their representative Ebrahimi, contended that ARCO was responsible for the contamination and demanded that the company help cover remediation costs." Instead, ARCO has referred to excerpts from the transcript of Mr. Ebrahimi's deposition testimony, which were included as pages 590-600

of the Supplemental Excerpt of Record filed by ARCO with the Ninth Circuit, without attaching the same as an appendix (See Opposition Brief, page 4, fn 4). In reply, Petitioners have attached pages 590-600 of the Supplemental Excerpt of Record filed by ARCO to show that the transcript is devoid of any facts in support of the Court of Appeals' findings in that regard (Reply Appendix 1a-8a)[1].

As it can bee seen from Mr. Ebrahim's deposition transcript, cited by ARCO, there is no testimony that Mr. Zaman ever made any contention of liability against ARCO. Nor is there any testimony that Mr. Zaman demanded that ARCO help cover remediation costs. That is why ARCO has not attached Mr. Ebrahimi's deposition transcript as an appendix. Finally and most importantly, the district court did not make any finding and the record is devoid of any evidence that Mr. Ebrahimi was acting as the representative of any of the Zaman Parties. Yet, the Court of Appeals made such a finding. The Court of Appeals' finding of facts in support of ARCO's Article III standing simply does not exist in the record. Thus, the Court of Appeals has acted in a clear departure from the accepted and usual course of judicial proceedings.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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[1] The Deposition Transcript's page numbers are indicated by [*] and the Supplemental Excerpts of Record's page numbers are indicated by [**].

[**589] No. CV95-0566 ABC (AWJx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ATLANTIC RICHFIELD COMPANY,
a Delaware Corporation,
Plaintiff

v.

JAMSHID ZAMAN, an individual, MAHVASH ZAMAN, an individual, BEHROUZ ZAMAN, an individual, ZAMAN INC., a California Corporation, d/b/a BEVERLY HILLS MOTORWORKS; and AFFORDABLE CARS, INC., a California Corporation,
Defendants.

VOLUME I

DEPOSITION OF ALI EBRAHIMI
FRIDAY, DECEMBER 11, 1998 [*42] [**590]

Q. You were paid by Mr. Zaman for assisting him in connection with efforts to develop the property?

A. Something like that.

Q. Can you recall how long that relationship lasted where you were a consultant or a fee developer?

A. I can't tell you the date. Eventually, we reach an impasse on question of indemnification; and that's basically when we drew - - we figured it's just, you know, not going anywhere.

Q. When you say you reached an impasse, an impasse with whom?

A. With ARCO.

Q. Over indemnity for off-site contamination?

A. Right. We were not so concerned about indemnity for on-site because part of the condition was we were going to clean it up so there was no further contamination or contribution to contamination would occur on the site and we would get a clean bill of health from the authorities.

But our problem was that the **[*43] [**591]** water in Beverly Hills moves. And it was - - At least it looked like that the contamination was not coming from any Source but this source. And, therefore, any contamination of neighboring properties would - - you know, they would come after us or whoever owns the building at the time. So we needed an indemnification.

Q. You sought an - - Oh, excuse me, please.

A. Yeah, we sought an indemnification from ARCO that if there's -in the future there is some claims by neighboring properties, that they would defend us and hold us harmless.

Q. And when you say "defend us, " do you mean Ersa Grae or Ersa Grae and Mr. Zaman?

A. Whoever was the owner of the building.

Q. And was this at a time - - or these discussions at a time when Ersa Grae was acting as a consultant or fee developer for Mr. Zaman?

A. Yeah, I mean, I can't really **[*44] [**592]** give you a date, you know, when actually the thing changed; but sometime during the negotiation with ARCO. The amount of time it was taking and, you know - - And so we chose to remain as a consultant rather than, you know, pursue as developer.

Q. And when you became a consultant, were you still seeking that indemnity from - -

A. Yes.

Q. - - ARCO?

A. Yes, because, you know, you needed it for financing. You needed it to sell the building in the future to - - It was just for a variety of reasons. It was . . .

Q. The concern about the water moving, was that a concern relating to possible gasoline in the water that would be moving off-site?

A. Oh, I don't know what element. I know one of the holes that either we drilled or ARCO drilled - - I can't remember whether it was us or ARCO - - but one of the holes was downstream in the street, not Burton Way The other street. **[*45] [**593]**

Q. Robertson?

A. Robertson. And it was quite obvious that, you know, there's contamination there off-site towards the south. And I, you know - - That brought the concern what happens if some of these people - - That hole was in the street. It wasn't on somebody's property. But what happens if somebody in the neighboring properties start, you know, claiming that the owner of this land has contaminated their property? And the first people they would sue would be the people who own the building. And that's why we thought it would be a - - you know, almost impossible to finance it and then later on sell it without that indemnity.

Q. Can you recall what particular elements were found in that well or boring drilled in Robertson? Was it waste oil?

A. I don't know.

Q. As you sit here today, you can't recall whether it was waste oil - -

A. No.

Q. - - or gasoline - -

A. Right. **[*46] [**594]**

Q. - - or some other element?

A. Just bad stuff. That's all I can tell you.

Q. How much did Ersa Grae receive for acting as a consultant to Mr. Zaman?

A. I don't know if we received anything or - - I don't know. I mean, our main compensation would have come from sharing in the, you know, eventual construction management fees and maybe get the personal profits or something like that.

Q. As you sit here today, can you recall receiving any moneys from Mr. Zaman at any time?

A. I really don't have a clue, that - - you know, how - - when it was transferred between us.

Q. At the time you had your dealings with Mr. Zaman, did you have an opinion as to how well Mr. Jamshid Zaman understood English?

A. I hardly ever spoke English to him. We spoke Farsi. So it was pretty hard for me to say if his English. . .

Q. In connection with any meetings **[*47] [**595]** that you and Mr. Zaman may have had with third parties, including ARCO, in those meetings did Mr. Zaman speak much; or did you do the bulk of the speaking?

A. No, I'm afraid I did most of the speaking. I don't know if it's because I talk too much or he's timid but - -

Q. But basically by agreement or some understanding with you and Mr. Zaman, you did most of the speaking in those meetings?

A. Well, I was more familiar with the issues, you know.

Q. I realize we're going back about 12 years in time here, and so it is very hard to come up with precise dates. But I'd like to ask when you first realized that there were contaminants in the ground that would have an effect on the ability to go forward with the contemplated development.

A. Pretty quickly after we signed the contract. We, you know - - As I said, there was some report that we became aware that there is potential contamination. And then fairly quickly we did the drilling and **[*48] [**596]** confirmed that there is contamination. And as part of the report - - I think it was in the report. Somehow we came up with the idea of approaching ARCO. And that's, you know, how it all started. But it was fairly quickly that we realized it was contaminated.

Q. Did that initial testing include the test in Robertson, to which you testified a couple minutes earlier?

A. That's why I said I don't know if it's us or ARCO because I know ARCO tested - - also did some drilling. And it was in one of those two that - - You know, I would be surprised if we did it because our main focus at the beginning would have been the property itself. And then maybe we would have gone back and do some off-site drilling. So, logically, probably it was done by ARCO; but I really, you know, can't remember.

Q. Who came up with the idea of approaching ARCO after you had identified some contaminants on the property?

A. I think the people who made the report. **[*49]**

[597]**

Q. Can you recall who those people were?

A. No. It must be in the documents somewhere, but I don't remember.

Q. Do the names IT - -

A. Yes -

Q. - - Testing -

A. - - that sounds very familiar.

Q. And was it someone at IT who suggested that, that ARCO be contacted?

A. I think so.

Q. Let me just try to understand the chronology. The contract was signed. You then engaged a company - - it could have been IT - - to do some testing on the property itself?

A. Yes.

Q. Testing came back with indication that there were some contaminants, although you can't at this point remember what those contaminants were.

A. Right.

Q. Did you next, in connection with this matter, approach Mr. Zaman to alert him to the fact that these contaminants were **[*50] [**598]** found at the property?

A. Yes, of course.

Q. And in response did Mr. Zaman say anything to you about those contaminants?

A. Well, he gave us what he thought was the history of the property; and we did some research ourselves. And then – Then, I think, we tried to find out who are the people who contributed to the contamination and tried to go and see if we can get them to share the cost of cleanup. And I assume that's how ARCO's name came up.

Q. By giving you a history, do you mean. that Jamshid Zaman told you how the property had been used?

A. Right.

Q. Did he, in that conversation, give any indication as to whether ARCO might be liable for some part of the cleanup?

A. Well, yeah, Mr. Zaman thought, you know, that he hasn't contributed to the contamination. And by elimination it must have been ARCO who owned the property for a long time or whatever.

Q. Did he - - By "he," I mean did **[*51] [**599]** Jamshid Zaman have a conversation - - discuss with you the fact that he had leased that property at one time to a company known as Atlas Leasing?

A. Yes. I mean, we went through - - I'm not recalling a specific conversation, obviously. I'm just - - you know, by my impression of the events. I mean, he - - his idea was that he really never - - I don't know whether he or the people before him tested the thing. Anyway - - the tanks. Anyway, his position or his belief was that he had not contributed to the contamination.

Q. But he did tell you who had used the property.

A. Right. We heard that from the title company, anyway.

Q. But you also got the history from Jamshid Zaman?

A. Right.

Q. And he told you who had used the property and how they had used the property?

A. As a gas station or what, yes. For what purpose they used the property.

Q. Did you at some point prepare a **[*52] [**600]**chronology of how the property was used and forwarded to ARCO?

A. I would not have remembered had I not seen it in these, but there was a chronology here that looked like it was prepared by me.

Q. And was that prepared, in part, from the information that Jamshid Zaman had given you?

A. Mr. Zaman, we obviously Although I believe what Mr. Zaman says, we didn't rely on everything he said because, you know, he was not very familiar with the laws and the con - - And so we - - We also got some help from IT, the consultants. And - - I don't know. We may have even had another consultant. Maybe we had two. And that's based on all that information. We developed, what we thought was the chronology.

Q. Although Mr. Jamshid Zaman wasn't familiar with the legal issues, he certainly was familiar with the factual history.

A. Yes. From the day he bought it, yes.